S. Hrg. 101-494

ADMINISTRATIVE DISPUTE RESOLUTION ACT OF 1989

HEARING

BEFORE THE

SUBCOMMITTEE ON OVERSIGHT OF GOVERNMENT MANAGEMENT

OF THE

COMMITTEE ON GOVERNMENTAL AFFAIRS
UNITED STATES SENATE

ONE HUNDRED FIRST CONGRESS

FIRST SESSION

SEPTEMBER 19, 1989

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ADMINISTRATIVE DISPUTE RESOLUTION ACT OF 1989

TUESDAY, SEPTEMBER 19, 1989

U.S. Senate,
Subcommittee on Oversight
of Government Management,
Committee on Governmental Affairs,
Washington, DC.

The Subcommittee met, pursuant to notice, at 9:40 a.m., in room SD-342, Dirksen Senate Office Building, Hon. Carl Levin, Chairman of the Subcommittee, presiding.

Present: Senator Levin.

Staff Present: Linda J. Gustitus, Staff Director and Chief Counsel; Kay DeKuiper, Professional Staff Member; Frankie de Vergie, Chief Clerk; Melinda Loftin, Counsel; and Elizabeth Woodcock, Minority Counsel.

OPENING STATEMENT OF SENATOR LEVIN

Senator Levin. Good morning, everybody.

This morning we are going to consider Senate Bill 971, the Administrative Dispute Resolution Act of 1989, introduced by Senator Charles Grassley. S. 971 authorizes and encourages the use of alternative dispute resolution methods by Federal agencies in order to allow agencies greater flexibility in the resolution of disputes with outside parties.

As the former president of the Detroit City Council and as a lawyer, I am all too familiar with the enormous burden that litigation can place on the parties involved. While there are many instances, obviously, in which litigation is the appropriate route to reach an effective and fair resolution of a particular dispute, there are also many instances in which a more flexible, consensual method can result in an effective and fair resolution at less cost, in a shorter amount of time, and even with less animosity.

We live in an increasingly complex world, and as a result, the laws and regulations we in the Federal Government create have become increasingly complex. Oftentimes, complicated situations require innovative approaches. Earlier this Congress, the Senate passed S. 303, the Negotiated Rulemaking Act of 1989. The purpose of that bill is to improve the Federal regulatory process by encouraging agencies to use negotiated rulemaking where appropriate. Negotiated rulemaking is a process that attempts to avoid protracted litigation over agency rules by involving the affected parties early in the rulemaking process and having them help craft the rule. We have learned through experience in negotiated rulemaking that it works.

I am sure that when used appropriately, alternative dispute resolution methods also work, and we will hear today some of those success stories from our witnesses. Alternative dispute resolution, or ADR as it has come to be known, encompasses such things as mediation, conciliation, fact-finding, minitrials, and arbitration.

The private sector has been making increasing use of such methods for years. A significant portion of our Nation's law schools now offer training in ADR methods, and many law firms have integrated the use of ADR into their daily practice. It is usually a good bet that if something does not prove itself useful or cost-effective in the private sector that it won't last long. This does not seem to be the case with ADR. The private sector's interest in this problem-solving technique is growing. Senate Bill 971 would allow the Federal Government to take greater advantage of these developments.

Many State governments have also begun to make greater use of the advantages of ADR techniques. Currently, there are 27 States with court-ordered arbitration programs, and there are four States with centralized dispute resolution systems. My own State of Michigan uses court-ordered arbitration, and the University of Michigan, for instance, houses a center for dispute resolution theory funded by the Hewlett Foundation.

ADR techniques are no stranger to some parts of the Federal Government either. Agencies are currently able to take advantage of many ADR methods without express authorization by statute or regulation. The Environmental Protection Agency, the Merit Systems Protection Board, and the Department of Justice have developed actual ADR programs. We'll hear about their experiences with those programs this morning. The Army Corps of Engineers was the pioneer Federal agency in this area and has reported great success in the use of ADR techniques, primarily in the area of contract law.

However, up until now, there has been no real Government-wide emphasis on the use of ADR techniques, and, therefore, there is little knowledge on the part of many agencies as to what ADR methods exist and what the accepted procedures are for their use. S. 971 is an attempt to bring such methods to the forefront and eliminate any inappropriate obstacles to their use.

S. 971 would encourage and authorize the use of ADR techniques by amending the Administrative Procedures Act and other relevant statutes to make clear the ability of agencies to engage in ADR and to set up a framework for the responsible utilization of these methods. The bill also draws upon the expertise of the Administrative Conference of the United States and the Federal Mediation and Conciliation Service to further aid agency use of ADR.

There are those who have raised concerns over the authorization of binding arbitration which is contained in Senate Bill 971. Binding arbitration can give rise to constitutional questions if there are not adequate protections included within the arbitration program. This hearing provides a forum to review this matter and other questions.

Before we continue I have a statement from Senator Heinz who was unable to attend the hearing today and I will insert it in the record at this time.

[Senator Heinz' statement follows:]

Opening Statement of Senator Heinz

Thank you Mr. Chairman for holding this hearing on S. 971, the "Administrative Dispute Resolution Act." I am looking forward to the testimony of our witnesses.

The legislation before us today goes a long way towards extending the benefits of alternative dispute resolution (A.D.R.) to the Federal government and the public at large. The private sector, many state governments, and even some Federal agencies have already found A.D.R. to be a very useful alternative to traditional means of litigation.

Formal procedures for resolving disputes between the Federal government and other parties now in place are often inefficient adding to the contentiousness and length of the resolution process.

For example, the Federal government has thousands of contracts dealing with everything from defense weapons systems to office supplies but if disputes arise over those contracts it can take as long as four years from the filing of the initial complaint until the entire issue is resolved.

In disputes involving the Federal government, alternative means of resolution could make the process quicker and less expensive. Through mediation, mini-trials, fact finding, and the use of settlement judges, parties could lessen the adversarial climate resolving differences in a mutually beneficial manner.

S. 971 recognizes that using A.D.R. is not appropriate in every dispute that arises with the government and makes its use voluntary. Encouraging the use of A.D.R. and the guidelines set forth in this legislation of clearly in the interest of all parties—the Federal government, business and the American taxpayer.

Thank you, Mr. Chairman.

Senator Levin. Again, I am pleased that we are considering Senator Grassley's ADR legislation today. I would like to welcome Senator Grassley and the other witnesses to our hearing, and we will first call upon my colleague, Senator Chuck Grassley, who has been so innovative in this area and a whole host of other areas as well.

Senator Grassley, welcome.

TESTIMONY OF HON. CHARLES E. GRASSLEY, U.S. SENATOR FROM THE STATE OF IOWA [1]

Senator Grassley. Over a long period of time, Mr. Chairman, I have had an opportunity to work closely with you and I thank you for the cooperation over the last 8 or 9 years that I've served with you. But today, I want to take advantage of the opportunity to thank you specifically on this bill, S. 971, the Administrative Dispute Resolution Act.

As you stated, this is a bill designed to encourage prompt, informal, and inexpensive resolution of administrative disputes involving Federal agencies. I would like to have a full statement entered in the record.

Senator Levin. It will, of course, appear in the record.

Senator Grassley. I will summarize very quickly because I know you have got a lot of witnesses.

First, Mr. Chairman, I also need to commend you at this point for your leadership on legislation to make administrative procedures less contentious. Your bill on regulatory negotiation, which I am also a cosponsor of, is evidence of that commitment. The bill before you today, in my view, is a perfect complement to your efforts on regulatory negotiations.

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[1] See p. 69 for Senator Grassley's prepared statement.

Now, notwithstanding, Mr. Chairman, the incredibly crabbed view that you will hear from the Justice Department—a view that I have just recently learned about—I think you and the members of the Committee will find much to commend in S. 971. As a veteran of the Independent Counsel Reauthorization, you, Mr. Chairman, have been through your share of separation-of-powers debates with the Justice Department. And I always like to modify these pure theories of constitutional law with common sense. Checks and balances are very much a part of our constitutional system, but some people in the administrative branch of Government don't seem to want to use a common-sense approach.[1]

But on this point, Mr. Chairman, I know the Committee already has the benefit of an analysis done by the Congressional Research Service, which I think lends strong credibility to our point on the constitutionality of this legislation. And with your permission, I would ask that an even more thorough analysis, published in the Texas Law Review by Texas law professor Harold Bruff, appear in the record.[1]

Senator LEVIN. It will be part of the record as will your full statement.

Senator GRASSLEY. Professor Bruff is a noted constitutional scholar. His article is entitled "Public Programs, Private Deciders: The Constitutionality of Arbitration in Federal Programs."

Now, over the past 50 years, as we've seen the Federal bureaucracy sprawl in every direction, a variety of agency boards and offices have been established. Whole new specialties of lawyers have sprung up to carry on litigation over energy, contract, environmental, safety and many other matters. Unfortunately, existing agency procedures often serve to increase the contentiousness of the parties to the administrative process. Agency procedures, which once were designed to be streamlined, have come to "mimic" those of our overburdened courts—and, of course, Mr. Chairman, with similar results.

An increase in agency litigation is undoubtedly good for the business of more than 600,000 U.S. lawyers now in practice. But lawyers don't have the ability to make our "economic pie" grow larger. They're only involved in arguments over how to carve it up. Other costs of agency litigation, such as delay, lost opportunities, and frustration, cannot be measured so easily but are just as real.

Enthusiasm for ADR, such as arbitration, mediation, minitrials, and negotiation, stem from the hope that it will reduce this burden on courts, on our agencies, and, of course, on the economy—and on that latter point, to the benefit of all society—and also will give us a more satisfying means of justice.

The Federal Government is in an ideal position to be in the forefront of alternative dispute resolution. Instead, with a few exceptions, most Federal agencies lag far behind private and other public entities that must resolve disputes.

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[1] See p. 272

This bill, Mr. Chairman, the Administrative Dispute Resolution Act, is designed to encourage and to extent the use of ADR by Federal agencies. Importantly, however, S. 971 is not heavy-handed. In fact, I almost think that we might be accused of not moving fast enough in this area because it doesn't compel Federal agencies to do anything. Indeed, the goals of S. 971 are modest. They are to increase voluntary efforts by agencies to resolve disputes by means other than traditional litigation.

Mutual asset is required in this legislation, for no party—Government or the private individual—shall be compelled under this bill to use alternative means of dispute resolution. Even with this understated approach, the bill will give impetus for meaningful change by sending a clear signal to agencies, reviewing courts, and regulated persons that informed, thoughtful efforts to use ADR will be supported.

Specific statutory provisions that inhibit effective negotiation—for instance, parts of the Federal Tort Claims Act and the Contract Disputes Act—are amended. The bill also repeals the General Accounting Office's overly restrictive prohibition on arbitration in cases where arbitration can be used consistent with the public interest.

Importantly, S. 971 recognizes that ADR is not appropriate for all cases involving the Government, just as with private dispute. Indeed, the bill sets out entire categories of cases in which ADR may not be prudent, such as when precedent is important, or when serious policy matters are at stake, or when others, not a party, will be substantially affected. There are other situations as well.

However, as a constitutional matter, the voluntary assignment by executive branch agency heads of discrete issues to arbitration need not give rise to separation-of-powers concerns.

Mr. Chairman, administrative justice need not be so expensive or time-consuming as it's evolved into. Congress and the executive branch should accept the challenge of fashioning a better agency approach to dispute resolution. The success of ADR in other arenas make likely similar success on the Federal level.

With this effort that is common elsewhere but not so common in the Federal Government, I hope that my colleagues will see the merit of this approach and join me in support of S. 971. Once again, Mr. Chairman, I want to thank you for your cooperation with me on so many different areas of making the regulatory approach within our Government work better, not only for the efficiency of Government but for the benefit of constituents affected both directly and indirectly by it.

I thank you very much.

Senator LEVIN. Senator Grassley, we thank you again for your leadership in so many areas of administrative reform, procurement reform, regulatory reform. You've been a true leader, indeed, and we're all in your debt. The country is in your debt for it.

Just a few questions. The bill recognizes that ADR is not appropriate in all cases involving the Government. Particularly, you have indicated—I believe in your written statement—that the bill sets out entire categories of cases where ADR may not be prudent, such as when precedent is important.

The Subcommittee on Federal Services, Post Office, and Civil Service has indicated that in the area of Federal employee law, precedent is important. And there is concern there that various arbitrators with similar cases would render decisions in different, conflicting ways. What would be your reaction to adding the exemption of Federal employee cases to S. 971 based on the precedential concerns and the fact that there are already procedures in place to allow the use of similar ADR methods?

Senator GRASSLEY. Let me not answer that question specifically for the time being, but let me tell you instead, about the philosophy behind the legislation, why we have the exemption for precedent. We don't want to discourage the use of ADR in the extent to which there's somebody wondering, well, if we use ADR, you know, and it's going to affect precedent, then you're going to have more limited use of ADR. We want this legislation to encourage ADR. And the extent to which precedent considerations might be involved, then obviously it might discourage it. So we want to avoid that burden for agency heads consenting to ADR. And if that's a problem in employee matters and we need to bring special attention to that to get the ball rolling, then I'm willing to consider that as well. But I want it to fit into this overall policy. And I think if people think of what we're trying to do here, then that might satisfy them to some extent. The extent to which it doesn't, then I'm willing to consider the amendment.

Senator LEVIN. The Justice Department, as you've indicated, has problems with the use of binding arbitration. Apparently, they raise both constitutional concerns and practical concerns with that approach. Some have suggested having a pilot program. My question is: What is your opinion of having a pilot program for binding arbitration?

Senator GRASSLEY. Well, again, if that's necessary to get people acquainted with the process, and it's not detrimental to the causes of Government or to Government serving society efficiently, then I'm willing to consider that. Again, you know, I'm afraid not on that end of the continuum, but on the other end that maybe people are going to look at what's going on in the private sector and local and State governments on the use of ADR, and find that we're too timid in this legislation.

So we need more evidence to move forward. Any step is going to be helpful in the process because we're decades behind other governmental bodies.

Senator LEVIN. I have not read all of the briefs, and I will read that article, by the way, which you submitted for the record as well. I am at least passingly familiar with a Supreme Court opinion in the case of *Thomas* v. *Union Carbide Agricultural Products,* which is a 1984 decision. Justice O'Connor was looking at an arbitration approach in a statute, and she wrote that to hold arbitration unconstitutional would "be to erect a rigid and formalistic restraint on the ability of Congress to adopt innovative measures, such as negotiation and arbitration, with respect to rights created by a regulatory scheme," and at least in that case held arbitration to be constitutional. So at least there's some recent language which is supportive of your position. I can't say that case is precisely on point, but surely the language of the opinion is seemingly very supportive of the approach that you're taking.

There is some confusion as to whether or not S. 971 gives an agency the authority to select an arbitrator with the consent of the other party. The CRS analysis we requested on the constitutional issues suggests that the agency selection authority is intended. Is that your understanding as to how the arbitration process would work in the bill?

Senator GRASSLEY. It seems to me that if arbitration means anything, and you put faith in that process, you've got to have both parties involved in agreeing to who that person is going to be.

Senator LEVIN. Would one party select with the other party having veto power or would it be some kind of a joint selection from a list? Are there any specifics you recollect in the bill, or is that left to the agency option?

Senator GRASSLEY. Mr. Chairman, could I ask my counsel on that point, please?

Senator LEVIN. While he's looking that up, let me ask another question. We may also need his expertise on this. That is the question of authority to fire an arbitrator or to terminate the arbitration. Is the bill explicit or silent on the question of terminating the arbitration or firing the arbitrator.

Senator GRASSLEY. On page 11, lines 9 and 10, we say, "A neutral who serves as conciliator, facilitator, or mediator serves at the will of the parties."

Senator LEVIN. Is it your intent that either party could discharge the neutral in the middle of the proceeding?

Senator GRASSLEY. It would seem to me that if you go into this with each trusting the other, and that this is the process that you want to use and it's voluntary, that those things ought to be decided ahead of time if the process is going to be of any value. And it would seem to me that you would go into it with the agreement of who the neutral is going to be and see the process through with the same individual.

Senator LEVIN. Would you then allow the parties to decide in advance whether or not they could discharge the arbitrator in the middle?

Senator GRASSLEY. Yes.

Senator LEVIN. That could be left a local option in effect or individual option as well?

Senator GRASSLEY. Yes.

Senator LEVIN. But that is not determined by the bill itself. You don't say in the bill that once the neutral is selected, that then the parties will either have the right on both sides to fire during the course of the proceeding, or to waive that right dependent upon the agreement reached. But that is your intention?

Senator GRASSLEY. Yes.

Senator LEVIN. Okay. Is it left that way for constitutional reasons or because of your voluntary spirit?

Senator GRASSLEY. Voluntary spirit.

You know, I would envision the S. 971 approach to get this process going, get people acquainted with ADR, encouraging experimentation, and all those facets of it—we want it to work, and it seems to me like voluntary spirit is a necessary part of encouraging it.

Senator LEVIN. Thank you so much for your work in this area. I appreciate your coming this morning.

We next have a panel made up of Edward Reich, who is the Acting Assistant Administrator for Enforcement and Compliance Monitoring of the Environmental Protection Agency; we have Mr. William Barr, an Assistant Attorney General in the Office of Legal Counsel for the Department of Justice; and Llewellyn Fischer, who is General Counsel of the U.S. Merit Systems Protection Board.

We will call on you in the order in which your names appear on the witness list, here. So, Mr. Reich, we welcome you. We thank you for appearing this morning.

TESTIMONY OF EDWARD E. REICH, ACTING ASSISTANT ADMINISTRATOR FOR ENFORCEMENT AND COMPLIANCE MONITORING, U.S. ENVIRONMENTAL PROTECTION AGENCY [1]

Mr. REICH. Thank you, and good morning, Mr. Chairman. With your permission, I would like to summarize my statement and ask that the full statement be included in the record.

Senator LEVIN. It will be made part of the record.

Mr. REICH. Thank you, sir.

My name is Edward Reich, and I am here in my capacity as Acting Assistant Administrator for Enforcement and Compliance Monitoring at the U.S. Environmental Protection Agency. I am very pleased to be here today to testify on S. 971, the Administrative Dispute Resolution Act of 1989. That EPA has been asked to testify is an honor to EPA in that it recognizes the agency's leadership in the use of alternative dispute resolution techniques. Both the EPA Administrator and Deputy Administrator advocate and support the use of ADR for a range of disputes involving the agency. As I will describe shortly, EPA has used ADR in a number of different types of disputes, including enforcement actions and rulemakings. EPA intends to continue in its efforts to use ADR and believes that this legislation can aid both EPA and other agencies in doing so.

One of the primary uses of ADR at EPA has been in the area of enforcement. In August 1987, former Administrator Lee Thomas issued guidance on the use of ADR in EPA enforcement actions. In addition to descriptions of the different forms of ADR and their applications within EPA's enforcement program, the guidance specifically endorses the use of ADR in selected enforcement cases and requests our regional offices to nominate appropriate cases for ADR. This guidance established the only formal program for the use of ADR in an enforcement program by a Federal agency.

Since that time, EPA regional personnel have proposed the use of ADR in more than a dozen enforcement and defensive actions. Of these proposals, the parties mediated three cases to settlement, and three others are now in mediation. Interestingly, almost all of the other cases nominated for ADR were then quickly settled by means of traditional negotiations among the parties. Additionally, a half dozen of the Agency's consent decrees and consent orders provide for the use of ADR techniques to resolve certain potential future disputes.

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[1] See p. 72 for Mr. Reich's prepared statement.

I believe it would be useful at this point to briefly describe two of our more significant enforcement ADR experiences. In the *Sheridan, Wyoming* case, EPA and the city had been attempting to resolve a violation of the Safe Drinking Water Act since 1979. The violation of drinking water standards involved the water supply to 300 persons by the city. In 1986, EPA proposed ADR as a means of resolving this long-standing problem. After considerable discussion, the city and the agency agreed to a process involving both mediation and fact-finding. One of the mediator's first acts was to bring in additional parties not directly involved in the enforcement action, but whose participation was essential to solving the underlying environmental problem, such as the county, relevant State agencies, the State legislature, and citizens groups.

The ultimate solution reached after less than a year of mediated discussions included the formation of a joint City-County Powers Board to address long-range drinking water problems throughout the valley where the city is located. This solution will result in improved drinking water for 5,000 people rather than just the 300 who were the basis for EPA's original enforcement action. This resolution would have been unlikely to emerge from the traditional adversarial process.

The underlying infractions in the *Union Carbide* case involved violations of Section 8(e) of the Toxic Substances Control Act for failure to report information about a certain chemical which allegedly posed a substantial risk to human health or the environment. The parties settled this action, and as part of the agreement, the company was to conduct an audit of its studies of other chemicals. As part of this audit, the parties anticipated information might be discovered that EPA would believe was reportable and the company would claim was not. To resolve these anticipated disputes, the parties set up a fact-finding process with neutrals of particular technical expertise to make certain factual determinations prior to the initiation of a civil action for penalties by EPA. Although no disagreements have yet arisen under this portion of the consent agreement, the ADR provision enabled the parties to establish a workable process to resolve any future, factual disputes.

EPA is also beginning to implement the use of arbitration in Superfund cost recovery actions under $500,000. Regulations addressing this effort were effective August 28th.

In the regulatory context, EPA established the Regulatory Negotiation Project in 1983 to explore and demonstrate the value of negotiation and other consensus-building techniques for developing better regulations which can be implemented in a less adversarial setting. Since that time, the project has run seven regulatory negotiations and is beginning an eighth. In five of the seven, the parties reached consensus on the proposed rule. Of the six rules that have been promulgated, only two have been challenged in court. In contrast, significant rulemakings using the more conventional approach tend to be challenged in court approximately 80 percent of the time. We believe that with careful selection of rulemaking projects, negotiated rulemaking can result in proposed rules that meet statutory requirements and which are pragmatic, innovative, environmentally effective, and acceptable to all parties.

Pursuant to its commitment to expand the uses of ADR, EPA has taken a number of steps to encourage its use within the Federal Government. The Agency is working with the Administrative Conference of the United States to develop a computerized roster of neutrals available for all Federal agencies. The Agency is also an active member of the Conference's ADR Roundtable which fosters ADR use in Federal practice. In this respect, the efforts of other agencies in using ADR should not be overlooked.

As you noted, Mr. Chairman, the Army Corps of Engineers has used ADR extensively to resolve disputes with contractors, and the Navy has made it a policy to presumptively use ADR in small contract disputes.

Relative to the legislation under consideration today, EPA welcomes the introduction of S. 971 as a generally positive step towards incorporating the use of effective ADR processes into Federal agency practices. However, we believe that there is no need for legislation authorizing the use of ADR in grant disputes, and thus recommend deletion of Section 3(b)(1).

EPA strongly supports the provisions of the bill regarding confidentiality of communications in ADR processes. Without this provision, parties may be unwilling to consider the use of ADR. We suggest that the provision be clarified to ensure that protected documents are not subject to disclosure under the Freedom of Information Act.

In conclusion, EPA believes that S. 971 provides the framework for an excellent piece of legislation. We appreciate the efforts of the Subcommittee in fostering the use of ADR and your interest in EPA's program. I would be pleased to answer any questions you may have.

Senator LEVIN. Mr. Reich, thank you so much.

Our next witness is William Barr, Assistant Attorney General in the Office of Legal Counsel, Department of Justice. Mr. Barr, we welcome you.

TESTIMONY OF WILLIAM P. BARR, ASSISTANT ATTORNEY GENERAL, OFFICE OF LEGAL COUNSEL, DEPARTMENT OF JUSTICE,[1] ACCOMPANIED BY JOHN O. McGINNIS, DEPUTY ASSISTANT ATTORNEY GENERAL

Mr. BARR. Thank you, Mr. Chairman.

Accompanying me today is John McGinnis, who is a Deputy Assistant Attorney General in the Office of Legal Counsel, and I ask that my statement be entered into the record in its entirety. Permit me to summarize some of the key points in it.

Senator LEVIN. Thank you.

Mr. BARR. The Department of Justice has encouraged and continues to support the use of ADR techniques in those cases where ADR can reduce the time and expense devoted to litigation. S. 971 is an ambitious attempt to promote ADR in the administrative disputes area. Although many of the ADR techniques covered by the bill may already be available to agencies, S. 971 would increase the use of ADR by adding the authority of a specific congressional enactment. Throughout the Government, the bill would exert a gravitational pull toward use of ADR as a means of deciding disputes.

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[1] See p. 86 for Mr. Barr's prepared statement.

S. 971 would authorize and encourage agencies to explore a number of ADR techniques that we, like the sponsors of the bill, would like to see more frequently used: conciliation, facilitation, mediation, fact-finding, minitrials, and settlement negotiations.

Because we believe it essential to develop alternatives to the full-scale litigation of disputes involving the Government, we have encouraged participation by our attorneys in a variety of experimental ADR methods. Our efforts have included the issuance of a policy statement encouraging the use of minitrials, participation in minitrials, and support for judicially supervised alternative dispute resolution techniques.

We have one major concern with the proposed legislation, and that is its provisions regarding binding arbitration. We believe that the binding arbitration provisions create practical problems as well as raising serious constitutional concerns. Let me focus first on the practical questions we think binding arbitration raises.

We agree with Senator Grassley that the principal problem here is judicialization of the administrative process. But the administrative process was essentially created to be arbitration. Arbitration is different than these other dispute resolution techniques we've been talking about. It is a trial. It's an adversary proceeding where both sides go to the mat for a decision.

The reason we've set up this administrative state is so that that process can take place in an informal and expeditious setting outside Article III courts. That's why we've created administrative agencies. Now, if the problem is that these processes have become overly judicialized within the administrative agencies and ossified over the years, we believe we should directly address that problem and reduce the amount of judicialization within the administrative agencies and provide alternative avenues within the administrative agencies so that parties can essentially get informal arbitration within the framework of the agency administrative process. That would obviate the legal questions, and certainly it doesn't go about trying to solve a problem by just letting the problem exist and throwing on another layer of procedures.

If the problem is delay in the docket, if the reason for delay and cost is that we don't have enough administrative law judges who are arbitrators—they're the neutral expert party—if we don't have enough of them or if they're misallocated, then we can address that within the existing administrative framework. If the problem is not the delay in the docket but the cumbersomeness and time-consuming nature of the procedures used in the decisional process, then we can provide alternative measures that can be used consensually by the parties within that process.

The second problem we have with the use of private binding arbitration is that it's really inconsistent with the whole rationale of administrative law. The reason we create administrative agencies, expert agencies, with neutral administrative law judges is precisely so that we can have a coherent application and development of the law in accordance with Congress' intent in setting up the structure.

Now, one ensures that policies are achieved and effectuated by the consistent application of principles in specific cases, which means precedent, or where we depart from precedent and change the way the law is applied to somebody, we do so in a principled, reasoned way that essentially creates another rule, which again has precedential value. And it's that way that we develop a coherent program. That's why we have an administrative agency.

Private arbitration of disputes creates just the opposite. It's desultory decisions that have no precedential value. As a consequence, similarly situated citizens could get different treatment from the Government because there is no precedential value in these decisions. That doesn't mete out justice.

Also, it deprives the agency of a framework in which to develop the law in a coherent fashion. Agencies frequently in the context of a specific case say, yes, well, the rule we've been following would lead to such-and-such a result. But this case throws into bold relief that that's not a good rule that we've been applying or that there are facts here that maybe we should have sort of a subpart B of this rule. And it's in the framework of dealing with these cases that the expert agency responsible, constitutionally responsible and responsible to Congress and the laws that Congress has passed, can work out a fair regulatory regime. You cannot get that with private arbitrators.

Also, when the Government applies or when a Government official makes a decision within the administrative process, it's the very fact that that serves as a precedent that acts as a constraint on the decision. And it ensures that neutral principles are applied. So that when a decision is made according to a rule and a finding by the decision-maker, the decision-maker has to say this is going to serve as a precedent. We have to be willing to apply this rule to every similarly situated person. That way you ensure that the rule is a neutral principle, and that's what this system of justice is all about, and that's what the administrative process is all about. But when you have people making decisions in individual cases where there's no precedential value to their decisions, that constraint is removed.

Third, these arbitration provisions go way beyond the justifying rationale for them. Remember, in the typical administrative process, you start with the initial decision-making level, typically a hearing where the facts are pinned down and there's an initial decision, and then you have layers of review to ensure that you do have a coherent program from the standpoint of policy.

Now, if the argument for arbitration is that you want to cut down on the cumbersomeness of that initial decision-making process, the hearing, then that might justify theoretically substituting the arbitration for the ALJ decision. But it doesn't justify doing away with review by responsible Government officials at superior levels, particularly from a policy perspective. The binding arbitration provision here, then, is being offered not as a substitute for the cumbersome hearing at the beginning, but as a way of short-circuiting the entire decisional process. We don't think that the case has been made to justify that apart from the constitutional concerns that that raises.

Now, the defenders of binding arbitration say, when push comes to shove, that we're not interested in getting into policy disputes or policy issues. This is a device that can be used, really, in pure fact-bound situations, really just pure fact-finding, where there's no policy component. There are a few problems with that. One, that's not what the bill says. And Senator Grassley said, well, as a matter of prudence, there are some areas you might not want to get into. It goes beyond prudence. I think all constitutional scholars would agree that there are areas where binding arbitration—where it serves as a binding precedent, where it affects third parties, where it does get into policy areas—is unconstitutional. Even those Law Review articles that are cited in support try to make this distinction between fact-finding and policy resolution.

Well, that's a very hard line to draw. You have Law Review articles and treatises written on what's a question of fact, what's a mixed question of fact and law, what's a question of law. It's very hard to define in any given context what a policy is, but it's particularly hard to say in advance whether a particular decision will implicate policy matters.

One of the fundamental defects with this bill is it commits the Government to living with a decision where the commitment has to be made in advance of the decision. That decision could involve—it's impossible to predict whether any given decision is going to involve—a policy component. So this is not a bill that's limited by its terms to fact-finding. Fact-finding is a term of art. This is not a bill limited to fact-finding. It's a bill that would permit arbitration of policy matters and policy-laden disputes.

Let me just briefly turn to constitutional issues. As we say in our testimony, we have serious constitutional concerns about binding arbitration. We believe that it is inconsistent with the appointments clause and with the President's responsibilities to see that the law is faithfully executed.

Now, there is a way of structuring arbitration so that you would obviate these constitutional concerns. The arbitrator could be selected and could be removed by the head of an agency with the arbitral decision not to become final until reviewed and approved by the head of the agency who is accountable to the President. This form of arbitration would avoid the constitutional issues, as I said. Arbitrators would be inferior officers appointed by the heads of the agencies and accountable to them, and their decisions would be subject to review. Under this arrangement, if the private party disapproved of the arbitrator selected by the agency, he could be allowed to withdraw his consent to arbitration.

While this method of structuring arbitration would be constitutional, in our view, it would not obviate the practical concerns we expressed about arbitration in the administrative context. Therefore, the option that we would recommend to the Committee would be to drop arbitration altogether and, instead, encourage the use of simpler procedures within the system of the administrative process.

Thank you, Mr. Chairman.

Senator LEVIN. Thank you, Mr. Barr.

Our third witness on this panel is Llewellyn Fischer, who is the General Counsel of the Merit Systems Protection Board. Thank you for being here, Mr. Fischer, and please proceed.

TESTIMONY OF LLEWELLYN M. FISCHER, GENERAL COUNSEL, U.S. MERIT SYSTEMS PROTECTION BOARD [1]

Mr. **Fischer**. Thank you, Mr. Chairman. I'd like to make my written statement a part of the record. I do have a few points I would like to summarize.

I'm very pleased to appear before the Subcommittee on behalf of the Merit Systems Protection Board. The Board, as we said in our written statement, has made extensive use of ADR over the past 5 years, and this use has resulted in an eight-fold increase in how we've utilized ADR.

A few points that are worth mentioning: The Board's use of ADR, of course, is limited to the employment field. We're confined to hearing employee appeals challenging agency personnel actions.

Secondly, the Board already has a statutory basis for use of ADR techniques. Title V, Section 7701(h) expressly authorizes the Board to implement alternative methods for deciding its cases.

The Board's ADR program is flexible. Except for mandatory prehearing conferences, no particular procedure or ADR device is required for use by its administrative judges in hearing cases.

Another feature that bears emphasis is that the Board has provided for a very thorough and continuing training program for its administrative judges in ADR methods.

In summary, the ADR techniques used by the Board have resulted in faster and less expensive case processing. For example, in the year 1988, cases using ADR were disposed of in 65 days, and cases adjudicated on the merits through the usual Board procedure took 99 days. Another feature and another favorable factor about ADR, mentioned in Senator Grassley's, testimony is that it avoids some of the acrimony that is fostered by the formalized judicial type of procedures between an employee and his or her agency.

The way ADR works at the Board is that when an appeal is filed, an order is issued that acknowledges the appeal. Both parties are then given the opportunity at that point to provide additional information to the administrative judge assigned to the case. And after that, there is a prehearing conference for simplification of the issues and some initial discussions on settlement.

One of the features at this point of the process is that the parties are asked to approve waiver of ex parte communications, and the Board makes sure that the representatives of the various parties have the authority to engage in settlement talks and bind their respective clients for purposes of disposing of the controversy.

If the parties agree to settle as part of this ADR process, the agreement is deemed final, and the Board dismisses the action with prejudice. The settlement agreement can be entered into the record, and if it is, then the Board can also enforce the settlement agreement.

A few brief comments on S. 971—the Board is committed to use of ADR procedures and that commitment is demonstrated by Board activity over the past 5 years utilizing ADR. Authorizing ADR techniques by legislation will, based on our experience, encourage the use of ADR. The provision for training those who utilize the techniques in the legislation is crucial in our view, because training of our administrative judges has been a key factor in the success of the ADR program at the Board.

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[1] See p. 107 for Mr. Fischer's prepared statement.

Flexibility is also crucial, and this legislation seems to give some flexibility concerning use of particular techniques. One thing that we found noteworthy based on our experience is that the bill does provide for participation of neutrals. The Board has not found it necessary in conjunction with its use of these techniques to have some outside neutral appointed. The administrative judge assigned to the case has been able to use these techniques effectively without the use of someone from outside.

That concludes my brief remarks. I'd be pleased to answer any questions at this point.

Senator LEVIN. Thank you, Mr. Fischer.

Let me first ask both Mr. Reich and you some questions about the current use of binding arbitration. Do you use binding arbitration currently? What you would consider to be binding?

Mr. REICH. Sir, the single instance where EPA has expressly adopted regulations for arbitration is in the solid waste program and, more specifically, under Section 122(h) of the Superfund law, which directed the Agency to adopt regulations for arbitration for cost recovery; that is, recovery of money spent by Superfund for claims of $500,000 or less. The regulations we have adopted are styled as binding arbitration.

There is, however, one very important caveat that I should make regarding Section 122(i) of Superfund. We are required, once we have a proposed decision by the arbitrator, to give public notice and entertain comments on that proposed decision. If the comments convince us that the decision is either inappropriate or improper or inadequate, then we have an obligation to seek modification of the decision so that it no longer is inappropriate, improper, or inadequate. If we then seek yet fail to obtain modification, we would withdraw from the proceeding, the decision would become null and void, and we would be basically back to square one.

Senator LEVIN. That's as close you come to binding arbitration?

Mr. REICH. Yes, sir.

Senator LEVIN. Mr. Fischer?

Mr. FISCHER. We do not use it at all, Mr. Chairman. Our use of these techniques is confined to an employee of the Board, an administrative judge who uses the techniques. We do not use outside neutrals.

Senator LEVIN. Outside what?

Mr. FISCHER. We do not use outside neutrals or arbitrators.

Senator LEVIN. Mr. Reich, could you describe for us any general types of cases which in your opinion are unsuitable for ADR?

Mr. REICH. Based on our admittedly still limited experience, I think the kinds of considerations that S. 971 puts forward reflect many of the concerns we have. We consider it generally inappropriate to use any kind of ADR process when dealing with policy issues or where the law is unsettled, and, therefore, where there is the potential for somebody to make legal decisions in the absence of clear precedent.

In the context of regulation development, and where the issue is one of fundamental value, we have found that the ADR process does not work as well. Thus our focus has tended to be on those kinds of cases where the law is well settled, we have a lot of experience, and we're dealing primarily with factual disputes.

Senator LEVIN. Going back to your answer to the last question, that you have a new regulation in Superfund which allows you basically to ditch the decision of the arbitrator if you don't like it or find it unsuitable or whatever those other words are; I would not describe that as binding arbitration. I don't know whether in the industry it's described that way, but as a lawyer, I would not describe that as binding arbitration. But without getting into the labeling of it for a moment, under those regulations, do both the parties to the arbitration have the rights to ditch it, or only the agency?

Mr. REICH. Only the agency, though only based on public comment that leads to a determination of inappropriateness, impropriety, or inadequacy. We could not simply withdraw from the arbitration process on our own initiative.

I should note that we have as of yet no experience with that regulation though it is my opinion that because a majority of these types of cases involve a single party and a small penalty, public comments will be rare.

Senator LEVIN. Is that a final regulation?

Mr. REICH. That is a final regulation. It only became effective August 28th.

Senator LEVIN. Did the proposed regulation contain that approach?

Mr. REICH. It did, sir, but the statutory provisions are very explicit.

Senator LEVIN. That follows the statutory language?

Mr. REICH. It follows a specific statutory requirement for that kind of process. Obviously, if we start using arbitration and many decisions wind up getting undone because of the public comment process, I think that will have an effect on people's willingness to use the process. We don't believe that will happen, but we do not yet have any practical experience.

Senator LEVIN. Is there an ALJ process which also can be used in that same area that you described, or is it limited to that option of the notice and comment process?

Mr. REICH. There is a different administrative process, but it does not involve the use of an ALJ.

Senator LEVIN. So there's not an option to use either the arbitration approach or the ALJ in that particular area?

Mr. REICH. Not in that particular area.

Senator LEVIN. Mr. Barr, do you by any chance know of any existing arbitration approach in any Federal agency which goes beyond the one which Mr. Reich just described for Superfund? When I say "goes beyond," do you know what I mean?

Mr. BARR. Right.

Mr. MCGINNIS. I believe there are some in the Federal Labor Relations Authority area where there are certain arbitrations between unions and Government that are or could be understood as binding arbitration. We think that what happened in that area was that arbitration is such a prevalent form of dispute resolution in the private labor context that it was just brought right over. But that is the really one exception in the area.

Senator Levin. Has that been tested constitutionally, do you know?

Mr. McGinnis. I'm not aware that there has been ever any decision under the appointments clause or under the President's supervisory authority.

Senator Levin. Have there been a lot of decisions by arbitrators in that area?

Mr. McGinnis. I'm really not aware of the practical decisions in that area.

Senator Levin. You don't know how many arbitrators have been appointed in that area and have rendered decisions?

Mr. McGinnis. No, I don't.

Senator Levin. Do you know if the arbitrator can be removed by either party in that area?

Mr. McGinnis. I don't.

Senator Levin. Okay. Back to the EPA. Do you train employees in the use of ADR?

Mr. Reich. Yes, sir, we do.

Senator Levin. Would you submit for the record your training processes?

Mr. Reich. I would be delighted to.

[The information of Mr. Reich follows:]

EPA Enforcement ADR Training Program

The ADR training program for EPA enforcement employees involves two efforts which center on the agency's Negotiation Skills Training Course. This course is held in every EPA regional office and at headquarters every year, and instructs EPA enforcement personnel, both attorneys and technical staff, how to negotiate enforcement disputes. As part of this course, the instructors briefly cover the basics of ADR, and EPA's policy to use it in appropriate cases. Additionally, in conjunction with the course, one of the instructions usually convenes a meeting of regional enforcement personnel, under the auspices of the Regional Counsel's Office, to discuss specific applications of ADR to the Region's enforcement docket.

Senator Levin. Do you notify parties involved with EPA as to the availability of ADR?

Mr. Reich. I do not think we do it systematically or routinely. If there is a case where we think it has some potential value, we will raise it. But we do not do so as a matter of course.

Senator Levin. I believe we had some data from Mr. Fischer on time savings. You may have given us some of that, too, in your testimony. I may have missed it. Did you? And if not, do you have any data on time savings, if any, resulting from the use of ADR?

Mr. Reich. I do not have any in the enforcement context. I would be glad to see if the Agency has some in the regulatory context and submit it if we do.

Senator Levin. That would be helpful if you would do that.

[The information referred to follows:]

Time Savings in EPA's Regulatory Program Through Use of ADR

Of the seven negotiated rulemakings undertaken by EPA, five resulted in a final rule. We estimate that the average duration of the rule promulgation period decreased from 42 months for a traditional major rulemaking, to 26 months for a negotiated rulemaking. It is important to note, however, that this estimate is based on very little empirical evidence. Nonetheless, the results are promising.

Senator **Levin**. Does this statute give you tools that you now don't have? Are there areas that you now are not using these tools where you would if this authority were put into law?

Mr. **Reich**. I think the legislation touches on many of the areas for which we are trying to use ADR. It certainly provides greater encouragement to use ADR and make it more acceptable for people both within the agency and who deal with the agency. From my perspective in the enforcement process, I think some of the provisions in the bill creating support mechanisms such as the development of a roster of neutrals, would support efforts we are making. So, while I think we can do a lot of things without legislation I certainly believe it is helpful.

Senator **Levin**. Going back for one more minute, again, to the Superfund area, when your interim regs, your temporary regs were published and during your comment period, did you receive much comment on that ability of the agency to ditch the decision? Was that the subject of a great deal of debate, discussion, comment?

Mr. **Reich**. I am not aware that it was, again, because that provision tracks very carefully the statutory language; and all we did was to amplify some of the mechanics. As to the question of whether the Agency ought to have that right, there was not a lot of comment. I think there were perhaps a couple of people who felt that it was an imbalanced process.

Senator **Levin**. Do you think the agency should have the right if the other party doesn't have a similar right?

Mr. **Reich**. Because of the particular concerns that we have as a Government agency, I think so.

Senator **Levin**. Aren't these factual matters? Then, again, we can separate facts from policy.

Mr. **Reich**. My basic assumption is that because of the very narrowly defined issues that will normally arise, the small monetary amounts involved, and because we will need to be very careful about cases that we agree to submit to arbitration, it is not likely to lead to a lot of public comment. Therefore, the Agency would not have to exercise its right of withdrawal pursuant to that provision very often. If that turns out not to be the case, then I think that there may be a little inbalance.

Senator **Levin**. Is it intended that this approach be used in purely factual matters? Is that what the intent of the statute and the regs are? Or is it intended that the arbitration approach also apply, for instance, to questions of congressional intent or other policy issues?

Mr. **Reich**. I think it is not intended to apply to policy issues, but rather to factual issues.

Senator **Levin**. If it is intended to apply only to factual issues, why should the agency have a right to ditch a fact-finding that's binding on the other party if the other party can't do the same? Why is it a one-way street if it's really a pure fact determination?

Mr. **Reich**. Part of the reason may go to the——

Senator **Levin**. Excuse me for interrupting. I'm talking in terms of fairness now.

Mr. **Reich**. I understand that.

Senator **Levin**. In terms of statutory scheme, your answer could be because that's what the Congress decided in its "wisdom."

Mr. **Reich**. Right. One possible reason is that in Superfund cases, as you are well aware, we are dealing with a large number of potentially responsible parties on the same side of a controversy. It is entirely possible that the arbitration proceeding might only involve participation by some subset of those parties. For instance, parties who have chosen not to participate in the arbitration proceeding, as they have a right to, could be concerned that the decisions reached may have an impact on them down the road. Thus, while the contribtion proceeding might deal only with factual issues, there may be other parties who might be concerned by the implications of the decision.

Senator **Levin**. Mr. Fischer, just a couple questions for you, and then we'll ask Mr. Barr some questions.

Do you encourage the parties to use ADR techniques?

Mr. **Fischer**. Yes.

Senator **Levin**. Is there a formal process where you notify parties?

Mr. **Fischer**. Usually, it's at the first prehearing conference on the controversy that the parties are advised of different options that they can pursue in terms of devices, ADR devices.

Senator **Levin**. Do you consult with the Administrative Conference or the Federal Mediation and Conciliation Service regularly on this, or do you just now have the process pretty well put in place that you don't have to have those regular consultations?

Mr. **Fischer**. Well, we do have an established process, and we have considerable experience. But we also engage in regular communications with ACUS, in particular.

Senator **Levin**. Mr. Barr, on the ALJ's versus arbitrators issue, as I understand your testimony, you have got less difficulty with using the arbitration process with certain restrictions if it is part of an ALJ process.

Mr. **Barr**. That's right, Mr. Chairman. We go to a lot of trouble to create this expert neutral body of decision-makers, to keep them neutral, to keep them expert, and to keep them politically accountable and responsible within the framework of a Government agency. Reading Senator Grassley's article about the use of ADR, really the one substantive achievement that he was able to point to, to quantify savings and greater efficiency, was the program in the Merit Service Protection Board, the VEAP program, which is a reform taken fully within the context of the administrative process and permits short-circuiting of some of the judicialization that has grown up.

The other point I'd like to mention on this is the question of why should it be binding. Now, ALJ decisions are reviewable, and they can be reversed within the agency by the top levels of the agency. And yet every day thousands of decisions are reached by the lower level people that are never reversed.

I don't understand why an arbitral award should be given greater dignity and greater insulation from review, particularly policy review, than a decision of the ALJ.

Senator **Levin**. Perhaps for two reasons, arguably. One is that there are, as I understand it, a large number of factual disputes that are not now subject to an ALJ proceeding. Secondly, isn't the ALJ intended to be part of an agency process, kind of one foot in, one foot out; whereas, an arbitrator would be somebody, as I understand it, who would be more independent than an ALJ? It would be someone outside of the agency, is that not generally what is assumed?

Mr. **Barr**. Well, no. I think we would say that an ALJ is genuinely independent.

Senator **Levin**. They are independent, but they are also in a sense part of an agency.

Mr. **Barr**. They are part of an agency in that they have a governmental duty in addition to their independence, which a private arbitrator doesn't have.

Senator **Levin**. Would a private arbitrator not be more independent than an ALJ?

Mr. **Barr**. No, I don't believe an outside arbitrator would be more independent.

Senator **Levin**. Would he be less independent?

Mr. **Barr**. I think it's hard to tell because I'm not sure what kind of policing mechanisms we would have to determine their independence.

May I say something?

Senator **Levin**. Yes.

Mr. **Barr**. I think the literature is pretty clear that the way arbitrators make their living frequently is by splitting the difference. If an arbitrator gets a reputation for being too harsh in one direction or the other, he is not going to be agreed to by either side. And so very frequently, arbitrators tend to split the baby and to impose not as much insistence on legal niceties as an ALJ might.

Now, that's not a good thing from the Government's standpoint, in my opinion, when we're trying to protect the public fisc.

Senator **Levin**. Public?

Mr. **Barr**. The fisc. Taxpayers' money. The Government is the ultimate deep pocket.

Senator **Levin**. Are there a large number of disputes which you would consider factual disputes which are now not subject to the ALJ process?

Mr. **Barr**. Yes. There probably are in Government.

Senator **Levin**. If there were an arbitration process that were adopted which had the same kind of protection that the ALJ process has in terms of regulatory review, would that not be a useful mechanism? Since there are disputes which are now not subject to the ALJ approach, why not find an approach that will resolve those factual disputes which meets the constitutional test of agency review, if, in fact, that is a constitutional requirement?

Mr. **Barr**. Well, to the extent that the process was within the Government, done by Government officials, neutral officials, and to the extent it was subject to review, we'd have no problem with that, as long as it was a suitable subject matter for that kind of fact-finding.

Senator **Levin**. Do you think that the arbitrator would have to be a Government official in order for this to be constitutional, providing the Government had the right to discard the decision?

Mr. **Barr**. No. As long as the decision was reviewable, then I think private arbitration would be permissible.

Senator LEVIN. To meet both the constitutional test and the practical test, then it's the reviewability by the agency which is the standard for you?

Mr. BARR. Yes.

Senator LEVIN. And if that reviewability were built in here, the way it was on that Superfund statute, then your practicality argument and your constitutional argument would be met?

Mr. BARR. If there was reviewability, for example, to the same extent there was reviewability of an administrative law judge's decision, yes.

Senator LEVIN. In your view, is this process more or less formalistic than the ALJ process?

Mr. BARR. I haven't seen any evidence that it's either.

Senator LEVIN. It can be either, in other words?

Mr. BARR. Well, you know, arbitration can be a pretty cumbersome process. There's not that much difference between arbitration and a trial. I've participated in arbitrations in the private sector, and it's very much like a trial. It has a certain mystique because the word sounds less nasty than "trial." But the fact of the matter is I doubt that there's that much time saved in the actual time of litigating a matter, between an arbitration where there's a lot of money at stake and an administrative process within the agency. I haven't seen the case made.

Senator LEVIN. Have you seen the case attempted?

Mr. BARR. Attempted? Not yet.

Senator LEVIN. No, have you heard anyone argue the case that arbitration is less cumbersome than litigation or an ALJ process? Have you ever had somebody set before you those arguments?

Mr. BARR. Yes.

Senator LEVIN. You're just not persuaded by them, then?

Mr. BARR. Well, I haven't seen the data. In the private sector, there's no doubt that arbitration saves a lot of time. Now, a lot of that is docket waiting. It takes a long time to get before an Article III court. So you can save a lot of time. And depending upon the nature of the arbitration and amount of money involved, you can short-cut a lot of the cumbersome Federal Rules of Civil Procedure. So when you're juxtaposing it to a trial in Federal district——

Senator LEVIN. No, no, to an ALJ process.

Mr. BARR. ALJ. I haven't seen the case made that the time it takes to arbitrate is significantly less than the time it would take to have an administrative hearing before an ALJ.

Senator LEVIN. Can you give us a status report on the Department of Justice experimental program in mandatory arbitration? Apparently, you've got an experimental program, at least you did a couple years ago, in 10 Federal district courts across the country. It was run by the Federal Judicial Center, and certain types of cases were removed from the usual judicial process and submitted to resolution with kind of a streamlined hearing and a neutral arbitrator. Are you familiar with that?

Mr. BARR. Well, if I am, what I'm thinking about are minitrials. The results of those are not binding on the Federal Government, so it's not a binding arbitration situation. But I'll be glad to get the facts from the Civil Division and give you a report on it.

Senator LEVIN. The article in the Administrative Law Journal indicated—this is a 1987 Law Review article—that it was just under way for only 2 years. The preliminary results indicate the programs may have induced early settlements, reduced time and costs associated with litigation and increased litigant satisfaction with the judicial process. So if you would, dig into that for us and get us what the Justice Department position is on that program that was run by the Judicial Center, as to whether you like it, don't like it, whether it's still in place or whatever.

Mr. BARR. Can I make another point, Mr. Chairman?

Senator LEVIN. Sure.

Mr. BARR. I think that reviewability would actually increase the use of arbitration in the Government because, as I said, it's very hard to predict in advance what the policy implications of a given case may be. And so there is going to be a natural reticence for the Government to agree to arbitration where it has to commit, before it even sees the decision, to be bound by it. Whereas, as long as there can be assurance of appropriate review so that there is administrative coherence and so that policy concerns can be decided by the appropriate officials, I think you would see a much wider use of summary kinds of procedures.

I think the experience in agencies is that very few of these decisions are overturned when they're decided by ALJ's.

Senator LEVIN. I may have asked this question; if so, forgive me. Is it intended that the ALJ's be limited to findings of fact in all cases where we now have ALJ's? Or do we have them making policy decisions? They do both.

Mr. BARR. Right.

Senator LEVIN. And it's intended they do both.

Mr. BARR. Right.

Senator LEVIN. And in the pure fact-finding situations, though, the agency still has the review power to the same extent that they do in policy decisions of ALJ's?

Mr. BARR. Well, I think that varies from statute to statute. In some statutes, it's a more narrow review, and in others it's de novo review.

Senator LEVIN. On the record?

Mr. BARR. Right.

Senator LEVIN. Anybody want to add anything before we call on our next panel?

[No response.]

Senator LEVIN. We may have some questions for the record for each of you. We're grateful for your being here. Thank you.

We finally call upon three true experts in the area of dispute resolution, a very distinguished panel made up of Gail Bingham, Vice President of The Conservation Foundation; Eldon Crowell, who is an attorney with Crowell and Moring; and Phil Harter, who is representing the American Bar Association.

We want to thank you all for your work in this area. You're a prestigious panel, indeed, and we'll call on you in the order that we have you on our witness list. Ms. Bingham, you're first. Please proceed.

TESTIMONY OF GAIL BINGHAM, VICE PRESIDENT, THE CONSERVATION FOUNDATION, WASHINGTON, DC [1]

Ms. **Bingham**. Thank you, Mr. Chairman.

Thank you for this opportunity to testify. I too have a full written statement that I would request be entered for the record.

Senator **Levin**. It will be.

Ms. **Bingham**. In my remarks this morning, I would like to focus particularly on the mediation of public policy issues. As I think this hearing has indicated so far, fundamental distinctions exist between mediation processes and arbitration processes that require substantially different considerations procedurally. I would defer to Mr. Crowell and Mr. Harter for discussion of arbitration.

The Conservation Foundation supports S. 971, and we particularly endorse four aspects of the bill: first, the general authorization of Federal agencies to use alternative dispute resolution processes; second, the recommended clarification of administrative procedures, particularly including the confidentiality provisions; third, an expanded role for the Administrative Conference—I would note along with neutrals in the private sector—to develop rosters and to provide technical assistance; and, finally, the funding of participation by qualified persons.

As many have said, alternative means of dispute resolution is simply good common sense. S. 971 provides an important endorsement of these procedures as part of sound administrative practice, while still providing the necessary clarification and constraints that are important for these processes to be used appropriately.

The case for applying alternative dispute resolution processes to administrative decisions is persuasive. In our pluralistic society, individuals and groups naturally have competing private interests and different perspectives about what's in the public interest. These conflicts emerge as specific disputes when policy, planning, permitting, or enforcement decisions are to be made by Government agencies. The examples obviously are legion: whether and under what conditions a hazardous waste facility will be sited, how to allocate the costs of cleaning up Superfund sites, what mitigation measures will be taken in siting a large public works project, or even how many board-feet of timber should be harvested on a national forest. Disputes also arise over promulgating the regulations that govern such decisions.

Mediation has been used successfully in all of these situations and more as I documented in a 1986 book entitled "Resolving Environmental Disputes: A Decade of Experience."

Numerous benefits of alternative dispute resolution processes are cited, particularly achieving more timely and more cost-effective decision-making by the avoidance of protracted litigation. But in my view, a more fundamental benefit, at least of mediated negotiations, is that these processes are more likely to produce a policy outcome that satisfies the interests of the parties involved. No one should be under any illusion that negotiations, at least in the short term, are necessarily inexpensive. It takes considerable investment of time and resources by all parties involved, particularly private parties, but the benefits of a better decision is of particular importance in public decision-making.

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[1] See p. 111 for Ms. Bingham's prepared statement.

The voluntary nature of mediation processes and the participation of the appropriate agency directly in the proceedings protects the public interests and the agency's accountability to Congress.

Relatively recently, the mediation of controversial public decisions has grown beyond the application of mediation on a case-by-case basis to the establishment by statute of procedures for resolving such disputes. I was pleased to learn that your bill, Mr. Chairman, the Negotiated Rulemaking Act, passed the Senate last month, and I would hope that it passes the House quickly as well. Statutes at the State level, in addition—in Wisconsin, Massachusetts, Rhode Island and other States—establish alternative dispute resolution procedures for such disputes as the siting of solid and hazardous waste facilities. At the Federal level, the Federal Insecticide, Fungicide and Rodenticide Act includes provisions for the arbitration of certain disputes. If enacted, S. 971, and your bill as well, will add to these steps toward a clearer procedural framework for ADR processes.

Such procedural clarification is important for two reasons. First, it clarifies the uncertainties and, thus, can increase the use of ADR processes. Second, such procedural clarification, if done appropriately, can prevent the misuse of ADR processes.

The Conservation Foundation is a not-for-profit organization established in 1948, and the Foundation entered the field of environmental dispute resolution in the mid-1970's. The goal of the Foundation's program on environmental dispute resolution is to increase the effectiveness of negotiated processes in public decision-making. To accomplish this goal, the Foundation conducts three kinds of activities: We provide mediation services for public disputes; we conduct research about the effective use of negotiation and mediation in public decision-making; and we provide technical assistance and education programs to share information about what we and others have learned in this field.

As I stated earlier, the Foundation wishes to express its support for S. 971. Commonly, one of the reasons that alternative dispute resolution methods are underutilized is that the parties to disputes, including agency staff, are unclear about certain basic assumptions that would set the framework for the process. In the absence of needed clarity, it is very difficult for parties to evaluate whether the process is actually more attractive than other options for deciding the issues. This, thus, decreases the likelihood that ADR methods will be selected.

The questions that need clarification are often relatively straightforward. When can a dispute resolution process be initiated and by whom? Who will participate? How will the issues for negotiation be defined? Will the outcome be voluntary, non-binding or binding? How long will the process take? Is there a deadline? What will the consequences of an agreement be if one is reached, and what will the consequences of a lack of agreement be, thus setting incentives clearly for negotiation? Will confidential communications be protected, and how much will the process cost?

The answers to these questions need not be rigid or reduce the flexibility that is one of the benefits of alternative dispute resolution processes. However, the particular encouragement that S. 971 gives agencies to promulgate policies that address and guide the use of ADR processes could have a very beneficial effect in creating a clearer framework for the use of such processes. I would note that the definitions in Section 4 are similarly beneficial.

The provisions for confidentiality are also a very important element of this bill. The statutory protection of confidentiality with the limitations and procedures for exception that are provided adds a very important protection to the parties and to the neutrals and to the ultimate success of the ADR process. An example that immediately comes to mind is also in Superfund enforcement cases. The Government and private parties participating voluntarily in settlement negotiations have an interest in protecting the exchange of information among the settling parties from discovery by recalcitrant parties against whom the Government may wish to take action.

The encouragement that S. 971 provides for administrative use of alternative dispute resolution could also substantially increase the need for neutral dispute resolution services by the Federal Government.

Several agencies, including the Federal Mediation and Conciliation Service and the Community Relations Service in the Department of Justice, employ neutral dispute resolution professionals. And, in addition, several thousand qualified neutrals practice in the private sector. However, the process of identifying and hiring neutrals could be improved by the creation and management of a roster, such as contemplated in this statute, in this bill. I would note a proviso, however, from a private sector perspective that Federal agencies ought, as is contemplated in this bill, retain the option to contract for the services of neutrals directly or for the development of rosters from the private sector.

It is our view that the Administrative Conference of the United States would be the most appropriate agency to develop and maintain the proposed roster. ACUS has devoted considerable study to this topic and has adopted a series of precedent-setting recommendations to encourage and to guide the use of ADR processes in administrative procedures.

The Conservation Foundation currently maintains a roster of professional neutrals under a contract with the EPA and has done so through several different mechanisms for approximately 3 years. It is our experience that to perform this function adequately requires, first, a staff with expertise in dispute resolution processes, and, second, a substantial amount of time and resources. A specific discussion of the maintenance of rosters in included in my written remarks.

I would like to make one point about the authorization of appropriations included in S. 971. I would encourage this Committee to separate in some appropriate fashion the proportion of the appropriation to ACUS intended for those costs associated with technical assistance and the maintenance of the roster from those funds anticipated to be granted to participants in dispute resolution processes, those who need reimbursement for expenses.

It is extremely important that any dispute resolution process involving policy decisions, such as rulemaking, permitting, or planning, include a balanced representation of all public and private interests that are affected by the proposed decision.

The costs of effective representation in some proceedings are considerable. Public interest groups, however, generally do not have the financial or personnel resources to bear these costs.

The Conservation Foundation would recommend that the following sentence be added at the end of Subsection 595(b), to state that "The Administrative Conference of the United States, in consultation with other Federal agencies, practicing neutrals, and public interest organizations, shall create a fund to pay all or part of the expenses of persons determined to be eligible for assistance in accordance with this section."

In our view, the proportion to be allocated to such a fund should be somewhat over half of the total appropriation, but we would defer to the view of ACUS in the exact allocation of that.

I would just conclude by thanking you, Mr. Chairman, for this opportunity and welcoming any questions you might have.

Senator LEVIN. Thank you so much.

Mr. Crowell.

TESTIMONY OF ELDON H. CROWELL, ESQ., CROWELL & MORING [1]

Mr. CROWELL. Thank you very much, Mr. Chairman. It's a great pleasure to be here. I, too, have a statement which I would request would be incorporated into the record of this hearing.

My position and my point of view are those of a lawyer who represents companies who have contractual disputes with the United States Government. I'm with a Washington law firm of about 190 lawyers. We represent companies all over the country. We represent large companies, small companies; we represent companies mostly who have Government contracts, and some who have no Government contracts at all. They get into disputes between themselves, and they get into disputes between themselves and the Government.

When they get into disputes between themselves, they use imagination, they use flexibility, and they often use a variety of techniques to resolve these disputes. At the present time, when they are in dispute with the United States Government, they are faced with the alternative under the contract of either proceeding through an administrative board or through the Claims Court route. Under the Contract Disputes Act, the administrative boards are closely, very closely, almost identical to the court.

These procedures are long; these procedures are expensive; these procedures are time-consuming. And the corporations, when they will hire us, or small companies, your constituents, they say: Look, we can do this much better in the private sector. Why can't we do it with the Government? What's so unique about the Government? Don't they want to settle disputes quickly and inexpensively and fairly with the people they enter into contracts with?

My answer is: They are very shy about this. Some of them will do this, and some of them, some agencies, will do it with success.

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[1] See p. 157 for Mr. Crowell's prepared statement.

And other agencies are afraid to do it because it is new to them and they are not confident that this will uphold the so-called rights of the United States Government. But our firm has been very active in this area. Let me just cite two examples of outstanding success. These are just two examples.

There are many, many examples that could be cited of success with alternative dispute resolution in contractual disputes between contractors and the Government, but these are so different. One is the dispute which we were involved in representing TRW when they had a very large dispute with NASA. This dispute involved millions and millions of dollars, very, very highly technical questions of fact, and it was resolved after a very short time through the use of a minitrial by the parties themselves voluntarily. There was no neutral adviser involved in this. This was a highly technical problem.

Another one in 1985 is the Tennessee-Tombigbee minitrial which was entered into with our client and the Corps of Engineers. This one did have a neutral adviser. This one also was settled to the entire satisfaction of both parties. And I might add parenthetically that it was later investigated by the Inspector General of the Department of Defense, the settlement was, because there was a complaint by someone. And the IG said this is a good way of settling disputes between contractors and the Government which will save everybody time, money, and a lot of grief.

Senator LEVIN. Was that settled or was there a judgment decision?

Mr. CROWELL. It settled. And the money has been paid, I might add, so we're very happy. [Laughter.]

I would like to emphasize a couple of points here. One, alternate dispute resolution procedures are voluntary. No one can force you into them. That's one of their beauties, because it means that both parties want to make an effort to solve the dispute.

Secondly, these mechanisms go all the way from one end of mediation to the other end of binding arbitration. We heard a lot about binding arbitration this morning, and it is certainly an important part of this whole spectrum. But it's not the principal part. I mean, it's not the most significant part in my opinion because we have seen other techniques, and particularly the minitrial, used far more than binding arbitration. Nevertheless, the concept of alternate dispute resolution is that it does provide different ways to solve these disputes.

Thirdly, I would like to say that we cannot believe that all disputes are appropriate for alternate dispute resolution procedures. That doesn't always work. But that is no reason why it shouldn't be available and shouldn't be tried and shouldn't be attempted simply because they don't always work. I think too many people in this field tend to become overeager about it and say this is the answer to everything. It isn't, but it certainly is an important answer to many important questions.

Also, alternate dispute resolution techniques provide for a creative way to solve problems. If you are in a situation where you're trying to solve a problem between 2 parties, a dispute, you don't always have to end up with "I'm a hundred percent right and you're a hundred percent wrong." Or you don't always have to end up with "I owe you X dollars." You can fashion solutions which are appropriate only perhaps for that one dispute.

Now, as to S. 971, I can say that I certainly heartily endorse this bill. I can also say that the clients that I have dealt with are more than interested in legislation which will encourage, as this legislation does, authorize and encourage Federal agencies to use these techniques. Particularly in the contract area, I think this bill is very effective in that it encourages contracting officers to use alternate dispute resolution techniques at all stages of the contracting process. For example, it is not necessary to wait until a final decision in order to use an alternate dispute resolution procedure.

Secondly, this legislation makes very clear that the Contract Disputes Act was not intended to preclude the use of alternate dispute resolution techniques.

Finally, it seems to me this legislation is of great aid in simplifying procedures for acquiring services of mediators through the National Mediation Service and through the Administrative Conference of the United States.

Altogether, I think that we in the Government area are frankly playing catch-up ball. The private sector is far ahead of us. This bill will, in my opinion, be of great assistance to those contractors who have contracts with the Government, who will have disputes with the Government, and can solve these disputes in a rational way without resorting to the complex, cumbersome, and expensive procedures which now have evolved through either the administrative boards or the Claims Court.

I also have a brief section in my prepared remarks dealing with the constitutionality of this. Mr. Harter, the next witness, is going to focus principally on that, so I will defer to him.

Senator LEVIN. We thank you, Mr. Crowell.

Mr. Harter, thank you for coming.

TESTIMONY OF PHILIP J. HARTER, ESQ., AMERICAN BAR ASSOCIATION [1]

Mr. HARTER. Thank you, Mr. Chairman.

I, too, have a remark that I'd like to throw into the record. I am a lawyer here in Washington. Also relevant to this morning's proceedings, I am a professor of administrative law both at American University Law School and the University of Maryland. I guess I'm an administrative law junkie, as it were.

Senator LEVIN. Do they play football against each other? [Laughter.]

Mr. HARTER. It's graduate school. We're too old for that nonsense.

I'm appearing here today on behalf of the American Bar Association. I suppose people normally think of the ABA as supporting rigorous, shoot-'em-up kinds of Perry Mason trials; in fact, we take our stewardship of the justice system quite seriously. To that end, the ABA has been actively promoting the use of ADR generally to resolve disputes. Indeed, I testified earlier on the judicially annexed arbitration programs mentioned earlier, and my colleague,

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[1] See p. 173 for Mr. Harter's prepared statement.

Dick Enslen, of the Western District of Michigan, sits on the ABA's Committee on Dispute Resolution with me and has been a real pioneer in the court use of ADR.

The ABA, as you know, also is a great supporter of the regulatory negotiation process, and we testified last year in support of your bill, applaud its passage this year, and are working to secure its early passage by the House.

In addition, the ABA has passed formal resolutions endorsing the use of a broad range of dispute resolution techniques and arbitration in particular by administrative agencies.

I adopt what my colleagues have said on the use of consensual processes by agencies—the use of mediation and conciliation, minitrials. Because arbitration has been the center of controversy here this morning in general—and maybe it's because it's more intellectually challenging—let me focus the rest of my remarks on that.

The Justice Department advocates the use of ALJ's in the traditional administrative process. It urges, as is quite accurate, that the entire administrative process was created as the alternative dispute resolution mechanism—alternative, that is, to formal courts. But, notwithstanding all kinds of studies over the years—we had the Attorney General's study; we had Hoover I, we had Hoover II; we had the Ash Commission; we had the temporary Administrative Conference; we have the permanent Administrative Conference—agencies remain part of the problem. There is no silver bullet, quick fix on how to reduce the delay and the formalities of the agency process.

The arbitration procedures contemplated by S. 971 would add another tool, just like a pair of pliers in a toolbox. Like pliers, it certainly is not appropriate for all uses, but it is very handy when it fits the need. Because of an absurdly narrow interpretation by the Comptroller General of an obscure little provision that nobody else has ever focused on, agencies are prohibited from using binding arbitration. So you will look in vain for agencies' use of that process except in the very few instances that have been explicitly authorized by Congress. As I will describe in a second, those procedures have been fully authorized and fully sustained by the Supreme Court.

To put the use of arbitration into context, it might help to relay a conversation I had about 2 years ago. An agency general counsel called me up and said that he had been planning to take his office on a retreat to a hotel in a resort city, but things got too busy and they had to cancel it. The hotel pointed out that because they had canceled the day before the retreat was to take place and 50 rooms all of a sudden went wanting, there was a damage clause in the contract. They negotiated for a while, and the general counsel said, "I could fully accept what they were claiming the damages were. I think we probably can get it a little less. But there's an arbitration clause in that contract. Can I arbitrate it?" he asked. He wanted a quick answer and asked me since I had worked in this area. The answer is no. Any other party would arbitrate that case very quickly, be done with it by 10:00 o'clock the next morning instead of investing the hundreds, thousands, perhaps tens of thousands of dollars of going through a formal process to decide whether the damages were $2,000 or $3,000. It cries out for an arbitral quick kind of process. Those are the kinds of issues that would be submitted to arbitration under this provision.

Let me turn and address some of the constitutional issues that were raised by the Department of Justice. They allege that an arbitrator who would make a binding decision, as contemplated in this bill, would have to be appointed by the President with the advice and consent of the Senate. As this Committee is no doubt aware, the Supreme Court recently analyzed just what constitutes an officer of the United States, and, hence, one that is required to be appointed by the President with advice and consent, when it upheld the constitutionality of your independent counsel provision of the Ethics in Government Act.

In summarizing its earlier decisions, the Court looked at several factors that are important in deciding whether somebody is an officer of the United States. It decided that she was an inferior officer and, hence, did not need to be appointed by the President with advice and consent. The standards it looked at were one, she was subject to removal by a higher executive branch official; two, she was empowered to perform only certain limited duties; three, she was not authorized to formulate policy for the Government or executive branch; four, the office was limited in jurisdiction; and five, the office is temporary.

Applying those standards to an arbitrator in S. 971: The bill does not provide that the arbitrator may be removed by a higher executive branch official, but it does specify that the parties are to participate in the selection of the arbitrator. That would seem to indicate that the arbitrator does not have the seniority of office which the Court's test appeared to invoke. In my prepared testimony, I add as a footnote, it would certainly not give me great heartburn if the arbitrator could be removed under the same conditions as the independent counsel could be. The agency head acting personally could remove an arbitrator for cause, subject to judicial review. The Court found that sufficient in *Morrison* v. *Olson*. I think that that would be adequate to protect the integrity of an arbitral process here.

As for the limited duties, an arbitrator is appointed for a single, narrowly defined proceeding, to resolve issues in controversy designated by the parties themselves. Thus, it would be limited duties, indeed.

The bill here specifically provides that arbitration is not appropriate for the development of policy, so that criteria is met. The office is certainly limited in jurisdiction since a narrow issue is submitted for resolution; it is very temporary—a single shot use of arbitration lasting perhaps a day or 2, maybe a week or 2 in a big case. You cannot get much shorter than that.

Thus, it seems inescapable that the arbitrator is at best, an inferior officer, and, hence, need not be appointed by the President. Congress can vest the appointment in an agency head. But beyond that, several arbitration schemes have been approved by the Supreme Court that use entirely private arbitrators. We talked earlier about the case of *Thomas* v. *Union Carbide*; private arbitrators make those decisions. Further, private arbitrators make final, binding determinations under Medicare, approved in the case of *Schweiker* v. *McClure*, under attack on both delegation and due process grounds. Thus, it would appear fully constitutional to have the arbitrator remain a private person.

It bears emphasizing that the Government will not participate in *any* arbitration unless a duly authorized official, either an officer of the United States or someone who is subordinate to such officer, makes the decision to do so. That person has the authority to define the scope of the proceeding to ensure that the resulting decision is well within the officer's authority to settle the matter. So whatever concern there may be about having an officer of the United States participate in the decision, they and they alone will make the decision to participate in the first instance.

Finally, taking up Article III, the Supreme Court has upheld an administrative arbitration scheme on grounds that the Court itself reserves enough supervisory powers to sustain Article III concerns.

I must also address the flip remark by the Department of Justice that arbitration is generally viewed as splitting the difference. I would like to see the evidence on that, since it flies in the face of a widely held view in the private sector that it serves a very important purpose. Indeed, if people shared that view, arbitration would not continue to be used.

To that end, and reflecting the current view of it, I would like to quote from a Supreme Court case that is about 3 months old, where the Court sustained the use of arbitration to resolve Securities Act cases, thereby explicitly reversing a precedent of about 20 years' duration. The Court says, "By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights offered by the statute; it only submits to their resolution in an arbitral rather than judicial forum. To the extent that *Wilko*"—the old precedent—"rested on suspicion of arbitration as a method of weakening the protections afforded in the substantive law to would-be complainants, it has fallen far out"—I repeat—"far out of step with our current strong endorsement of Federal statutes favoring this method of resolving disputes." That's a quote from the Supreme Court of about 3 months ago.

Finally, I would like to talk a little bit about judicial review and whether an agency can terminate a proceeding. It strikes me that once in an arbitration proceeding which is intended to be binding and resolve the issue in controversy, that neither party—neither the Government agency nor a private party—should be able to withdraw simply because their case is going badly. On the other hand, a Government agency needs to have the authority to withdraw if the proceeding would violate the standards that are described in section 582(b), which basically say this arbitration cannot involve substantial issues of policy or cannot impede on rights of people not there. So, if once into the arbitral proceeding it appears that those standards would be violated, the agency needs the ability to withdraw, and that should be subjected to judicial review under the normal standards accorded the administrative action. That decision is not an arbitral award, so it would not have the narrow grounds of judicial review but, rather, should be accorded under traditional judicial review of Section 706 of the APA, you do not want the agency to be able to bail out, so I would hope legislative history would indicate that the court must pay attention to make sure that it is those standards that are being violated, not just the fact that the case is going badly.

If the agency itself is entitled to review an arbiter's award and to decide whether it is good or bad, then the value of arbitration is diminished. That would be the third bite of the apple for the agency, the first being the negotiation between the parties. If they are unable to reach a consensual agreement, they agree to arbitrate it for the second bite. Then if the agency does not like it, it wants to be able to reverse it. Any rational person would be reluctant to get into an arbitration and engage in the time and expense of going through it, only to have the agency head say that, well, he doesn't like it and is going to reverse it. That would simply destroy the entire benefit of arbitration where you build in other kinds of safeguards, other means to ensure a fair and quick decision, where finality is really the purpose.

Thank you, Mr. Chairman.

Senator LEVIN. Thank you, Mr. Harter.

Let me just pick up right there. It seems to me that the challenge here is to try to produce something which will be utilized. These are voluntary mechanisms, and if they are not appealing to either party, they are not going to be utilized. We will have, then, encouraged something with the one hand and see it atrophy on the other hand. So that is the challenge we have.

Now, we have the Justice Department today basically saying that unless the agency can review the decision that it believes it should not be used. If they are speaking for the Administration—I don't know that they are, but if they are speaking for the Administration or for any administration——

Mr. HARTER. This Administration.

Senator LEVIN. Well, we don't know if they are speaking for this Administration necessarily, but——

Mr. HARTER. At best.

Senator LEVIN [continuing]. If they are, they also may be reflecting a point of view that any administration might have, which is we want our agencies to review decisions that are binding on us. Maybe that is endemic to the beast of the Executive power and any attorney general's office. I don't know.

But the Attorney General today, at least, is saying he would recommend against its use—I guess that is what he is saying—unless it is subject to review by the agency. Assume for the moment that is what his testimony is; it is pretty close to that. He doesn't put it on Constitutional grounds alone; he has Constitutional questions about it being foisted on the Executive Branch, being put in a statute—you are just raring to go, Mr. Crowell——

Mr. CROWELL. Yes.

Senator LEVIN. I'll try to get to my question. I'm thinking out loud, that basically, the Attorney General says he doesn't like it and doesn't want agencies to use it, and if that reflects the White House point of view, we can put it in a statute, and they are not going to voluntarily use it.

Comment on that, please. You look like you're the most ready to charge there, Mr. Crowell.

Mr. CROWELL. The current method of dispute resolution in contract cases is one through an administrative board. The head of that administrative board is not an AJLA; he is appointed by the Department; he makes a decision. There is no review of that decision whatsoever except by the Court of Appeals for the Federal Circuit.

So for the Justice Department now to come in and say an arbitrator, unless we can review it—this is happening all the time now, and the review is in the Court of Appeals for the Federal Circuit for these very decisions. I don't understand that position.

Senator LEVIN. What would be the advantage of the arbitrator over that board other than short-circuiting the wait?

Mr. CROWELL. Well, it is far less expensive, far more efficient. You can get the job done quickly. You can get it done without tying up your administrative, technical and expert personnel for months on these other trials.

It is not just the cost of lawyers, although they certainly are expensive. It is also the cost of the people involved in one of these hearings—the vice president, the chief engineer—there are all kinds of people that corporations want to put on more productive work, looking forward instead of looking backward. Arbitration is going to help that.

Mr. HARTER. There are two other components to that. One is that under arbitration the parties are explicitly authorized to design their own process—how much fact-finding do we need, what kind of fact-finding do we need, who is going to do it, what is the whole role of the process. That has merit in its own right.

The second is that notwithstanding the expertise of ALJs, which many of them have a lot of, they are lawyers, and a lot of these disputes are high-tech, non-lawyer things. I'd much rather have an engineer decide whether that concrete poured in that building met the specs or not as opposed to a lawyer guiding his witnesses through the concrete specs, the Justice Department going through theirs, and then having a lawyer decide as to whether that concrete meets the ASTM standards. It really is much easier to get the three engineers together and have somebody make a decision. This would permit that; the APA does not.

Senator LEVIN. Do you want to comment, Ms. Bingham?

Ms. BINGHAM. Just briefly. It seems to me that this is an area where it is useful to make a couple of distinctions, the first between mediation and arbitration, and another that may need some more thinking, between various types of disputes that the Federal Government gets involved in.

I think the evidence out there indicates that Federal agencies are using and interested in all applications across that spectrum of ADR in a variety of cases. So to your question of whether this Administration will in fact use these processes, I think that they are and would continue to.

With respect to the Justice Department's concern about reviewability, I would refer I think particularly to Mr. Reich's testimony with respect to cost recovery cases. Where arbitration is applied to enforcement cases, the reviewability that is established in EPA's regulations seems very appropriate to us.

Senator LEVIN. You say that the Government has used or has shown an inclination to use all forms of dispute resolution. Have we used an arbitration process which is binding?

Mr. **Harter**. Yes, sir. The arbitration in *Thomas* v. *Agricultural Chemical* is used by EPA to resolve issues of compensation under the Pesticide Act.

Senator **Levin**. Not subject to agency review?

Mr. **Harter**. That's right. Under the *Schweiker* v. *McClure* case, reimbursement under Medicare B is resolved by the insurance carriers.

Senator **Levin**. But that's between the private parties.

Mr. **Harter**. Yes, but who pays the bill? Who pays the insurance carriers? The Federal Government. HHS pays it. It ends up being——

Senator **Levin**. We pay it, but it is not technically where we are a party to it?

Mr. **Harter**. I think that is right, but the Government fisc is at risk in those decisions notwithstanding. Indeed, part of the important criteria of the Supreme Court was that the Government was paying, and so the arbitrators did not have a conflict of interest.

Senator **Levin**. The first case that you mentioned, would that not be familiar to the Justice Department? They were in the case. I mean, how would——

Mr. **Harter**. Now, those were between private parties. It is where one pesticide manufacturer is using the data of another, and the result of the claim is how much one company has to pay another.

Senator **Levin**. Is that how Mr. Barr would distinguish that case?

Mr. **Harter**. Probably.

Senator **Levin**. Is there any case that falls into the area where the Government is currently bound by a decision currently where there is an arbitrator that makes a binding decision not subject to agency review?

Mr. **Harter**. In the Federal labor situation——

Senator **Levin**. Which is a more traditional area, perhaps, but nonetheless useful. Do we know of any other situation where there is binding arbitration?

Mr. **Harter**. I want to repeat that unless Congress has explicitly authorized it, it is currently illegal to do it. So that agencies are not going to be creative and do it on their own.

Senator **Levin**. Do we know of any cases where Congress ever has authorized it?

Mr. **Harter**. I do not.

Ms. **Bingham**. No.

Senator **Levin**. Other than that labor——

Ms. **Bingham**. Mr. Chairman, since this is such an important issue, I believe in fact that even in the labor area there is a provision for reviewability of those binding arbitration decisions. I think that perhaps this is not as big a problem, however, as it is being made out to be. Those reviewability provisions may provide the safeguard that the Justice Department feels is important, and my guess, as Mr. Reich and others have said, is that they are very unlikely to be used. In fact, it is in the agency's interest because they, just like the private parties, wish to reduce the costs of decisionmaking. They are not going to see these decisions overturned very often in my view.

Senator **Levin**. I agree with that. I think that that is true. This maybe shouldn't take so much time, except it is the most contentious part of the bill.

Ms. **Bingham**. Certainly.

Senator **Levin**. It may not be the only important part of the bill—it isn't—there are a lot of other very critical parts to the bill, and I hate to spend what time we have this morning focusing mainly on this one area. But since it is the contentious area, the one that can stop the entire bill from being adopted or possibly vetoed, I think we are wise having acknowledged that other parts of the bill are just as important, still focusing for the most part on this particular issue.

And even though you are right—I happen to agree that you are right—that it would be unlikely that the review would be used very often, the question is whether the review should be inserted in the bill in order to avoid its veto, in order to avoid its opposition by the Justice Department, in order to avoid a whole bunch of hurdles, in order to avoid Constitutional claims against it and so forth. I think that's what I'd like to focus on at the moment.

Mr. **Harter**. I would be troubled if the agency could simply substitute its judgment and say, "We don't like the outcome." That is inconsistent with the whole idea of arbitration; it is inconsistent with the kind of process that Mr. Crowell has envisioned.

I am not troubled if the agency has a review power and can decide that the standards that the bill sets out in § 582 are not met—did the arbitral award in fact impinge on policy; did it in fact end up in an area where consistent decisions should be made, and whatever that list of standards were. To the extent that that kind of review power is appropriate, I set out what I would propose as a new kind of judicial review, a reformulated judicial review standard, on page 22 of my testimony. I would authorize an agency to terminate a proceeding while it is going on because it impinges on those standards.

It would not bother me to say, then, also that the agency could reject an arbitral award on those grounds. But it cannot reject the award simply because it does not like the outcome.

Senator **Levin**. You don't like the standard that we adopted in the Superfund case, where apparently the words are "inappropriate"—I think that was one of the words, "inappropriate."

Mr. **Harter**. What I interpreted Mr. Reich as saying is that under Superfund generally, the scheme is that once a settlement is reached with a party, it is put out for notice and comment in the Federal Register, for people who are affected by the review. It is a form of public notice of what is going on. Under the scheme of the Superfund, unless someone comments adversely, the agency will adopt the arbitral award. But it is a safeguard for public participation to see if there was anybody adversely affected by something that went on to which they were not a party. It is not simply saying the administrator can scratch his head and say no.

Senator **Levin**. It sounded fairly broad, but we'll have to get into it much more deeply. I guess the dilemma that we are going to face in marking up a bill like this is whether or not we should put in a standard which is broader than we might like but which meets the requirements of the Justice Department on the ground that we would thereby be, as a practical matter, achieving our goal since it is unlikely the agency would use a broad power very often because it would then undermine the whole purpose.

Mr. CROWELL. There are two important, it seems to me, safeguards in the bill already. One is that it has got to be mutual—and I am talking about arbitration—one party cannot insist on it and demand it if the other party doesn't want it. And second is the language which says the dispute must not involve policy questions, making of a precedent or affecting third parties. Now, the Justice Department apparently complains that in some cases that may be difficult to determine.

Senator LEVIN. In advance.

Mr. CROWELL. Sure, it may be difficult to determine. But they make these kinds of decisions all the time in the Department of Justice. And to back away from something that they are going to voluntarily enter into because they say it is going to be difficult to make a determination, well in that case, they don't have to enter into it.

Senator LEVIN. Well, that's the practical question we face. If we put language in here which "the administration"—and again, we are guessing on that—or any administration—and we surely are guessing on that—might not utilize because it finds it to be too uncertain and sends a directive around to all of its agencies which says, "We are instructing you not to utilize this voluntary mechanism because there is inadequate agency review"—let's assume that were the position of the Justice Department; they say, "We feel strongly; we don't want our agencies being bound by a process where there is no agency review." Now, I am overly simplifying this for the purposes of discussion, but that is a dilemma for us as legislators. We want to encourage the use of these mechanisms. I think that's the point of the bill. I think all of you obviously want to encourage them, and I want to encourage them and I believe strongly in them. The question is whether we will be encouraging them more with a bill which seems on its face to be encouraging them more and is more logical from the perspective that we have, but which won't be as a practical matter utilized by at least this Justice Department or this Administration's agencies because there is too uncertain a sea that they are embarking on.

Now, as a lawyer, I have to tell you that I'm not so sure how often I'd want to embark on this for a private client when the other guy has such vast power to undermine the product of an arbitration. I'm not so sure I'd want to invest in an arbitration, timewise, where the other guy can say at some point in the proceeding, "Sorry, we don't like the way your boat is drifting." But that's a different problem.

At any rate, that seems to me to be one of the challenges we face in looking at this bill is how much, as a practical matter, we want to accede to the Justice Department's complaints, whether we like them or not, in order to accomplish a goal. As a practical matter, we may accomplish it even with broader review language than we like because they are never going to use it, or rarely would use it because they don't want to undermine a process which they are going to come to like.

Okay, I think maybe we've spent enough time on that. I have a lot of other questions which I'd like to ask, but I am not going to be able to take the time to do it. Let me ask each of you whether you would continue to be available to us. You have been terrific, and we will have additional questions for the record.

Is there anything that you want to add this morning, briefly, before we adjourn, knowing that the likelihood is we're going to need some more input from you in the days ahead?

Mr. CROWELL. I think there is a great need for this legislation. I think that when ADR has been used in the past, it has been successful.

Mr. HARTER. I guess I would just advocate that no arbitration is going to happen without a Federal official defining its scope and authorizing it; let's see what the market outs. Let's see if it is used, and maybe they'll try it and like it after all.

Ms. BINGHAM. I would just say thank you again, and I am certainly available for further consultation. The only note I would end with is to encourage the Committee to continue to distinguish carefully between the procedural aspects appropriate to mediation and to arbitration.

Senator LEVIN. We will. I think we got that point, and again, forgive us for focusing so much on the arbitration side of this, but it is the most contentious part and the one which, unless resolved, is going to block the less contentious part from becoming law.

Let me throw a challenge at you, three of our foremost experts on dispute resolution. Apparently, there is a dispute going on here with the Justice Department. I was a little surprised by the testimony, but not totally. I thought there might be some problems that Justice had with it, but they are a little more severe than I expected.

Would it be useful for your community, if you don't mind my addressing you that way, and the Justice Department to sit down with us on this bill and talk about some of the issues. It is too bad in a way we didn't have one panel rather than two—that sometimes happens—because I think we could have cleared up some issues. I know my staff is probably trying to figure out what I'm getting them into which they didn't plan on—and maybe you've already met with the Justice Department, and we just have to resolve it the best we can. But if we convened a meeting with the Justice Department and the alternative dispute resolution community, if I can phrase it that way—and you are as good a group of representatives as we'll ever get of that community—would that be useful, in your view?

Mr. HARTER. Are you mediating or arbitrating?

Senator LEVIN. Nonbinding, I can assure you.

Mr. CROWELL. I would personally be very happy to participate in any such discussions.

Ms. BINGHAM. Absolutely.

Senator LEVIN. Good. I wish I had asked Mr. Barr the same question. I don't know whether someone from his office is still here or not. But in any event, we will at least consider that, and I will see if my staff thinks it is a good idea, and if not, I'll probably do it anyway to show my independence now that I have thrown it out. But let's at least explore that possibility, because we do want to take a look at this bill in a serious way. It is an important bill, and we'd like to see it move in one form or another.

Thank you all.

[Whereupon, at 11:55 a.m., the Subcommittee was adjourned.]

APPENDIX

II

101st CONGRESS
1st Session

S. 971

To authorize and encourage Federal agencies to use mediation, conciliation, arbitration, and other techniques for the prompt and informal resolution of disputes, and for other purposes.

IN THE SENATE OF THE UNITED STATES

May 11 (legislative day, January 3), 1989

Mr. Grassley (for himself and Mr. DeConcini) introduced the following bill; which was read twice and referred to the Committee on Governmental Affairs

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A BILL

To authorize and encourage Federal agencies to use mediation, conciliation, arbitration, and other techniques for the prompt and informal resolution of disputes, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Administrative Dispute Resolution Act".

SEC. 2. FINDINGS.

The Congress finds that—

(1) administrative procedure, as embodied in chapter 5 of title 5, United States Code, and other statutes, is intended to offer prompt, expert, and inexpensive

means of resolving disputes as an alternative to litigation in the Federal courts;

(2) administrative proceedings have become marked increasingly by formality, costs, and delays and often result in unnecessary expenditures of the time of individuals and the resources of society and decreased likelihood of achieving consensual resolution of disputes;

(3) alternative means of dispute resolution (including settlement negotiations, conciliation, facilitation, mediation, factfinding, minitrials, and arbitration have been used in the private sector for many years and, in appropriate circumstances, have yielded decisions that are faster, less expensive, and less contentious;

(4) such alternative means also lead to more creative, efficient, and sensible outcomes that foster stability because of the acceptability of such means to the parties involved and the public in general;

(5) such alternative means may be used advantageously in widely varied administrative programs;

(6) explicit authorization of use of well-tested dispute resolution techniques will eliminate ambiguity of agency power under applicable law and will encourage use of commonsense procedures in appropriate cases;

(7) every agency shall undertake a careful review of programs and the disputes involved to ensure increased application of appropriate alternative means;

(8) Federal agencies may not only receive the benefit of techniques that were developed in the private sector, but may also take the lead in the further development and refinement of such techniques; and

(9) the availability of a wide range of dispute resolution procedures, and an increased understanding of the most effective use of such procedures, will enhance the operation of the Government and better serve the public.

SEC. 3. PROMOTION OF ALTERNATIVE MEANS OF DISPUTE RESOLUTION.

(a) PROMULGATION OF AGENCY POLICY.—Each agency is encouraged to promulgate policies that address the use of the full range of alternative means of dispute resolution and case management in each administrative program of such agency. In developing policy, each agency is encouraged to—

(1) consult with the Administrative Conference of the United States, the Federal Mediation and Conciliation Service, and professional associations; and

(2) examine procedures for resolving every kind of dispute including controversies that arise as a part of—

(A) formal or informal adjudication;

(B) rulemaking;

(C) enforcement;

(D) issuing or revoking permits;

(D) settling disputes; and

(F) litigation brought by or against the agency.

(b) DISPUTE RESOLUTION SPECIALISTS.—Each agency shall designate a senior official to be the dispute resolution specialist of the agency. Such official shall implement—

(1) the provisions of this Act with regard to such agency; and

(2) the agency policy promulgated pursuant to subsection (a).

(c) TRAINING.—Each agency shall provide for training to be made available regularly to the dispute resolution specialist of the agency and other employees involved in implementing the policy of the agency under this Act. Such training may encompass theory and practice of negotiation, mediation, arbitration, or related techniques. The dispute resolution specialist shall periodically recommend to the agency head a list of agency employees for similar training.

(d) PROCEDURES FOR GRANTS AND CONTRACTORS.—

(1) Each agency shall review each of its standard contract, grant, and other assistance agreements and shall amend them to authorize and encourage use of alternative means of dispute resolution at all stages where disputes under future contracts or agreements may arise. The Office of Federal Procurement Policy of the Office of Management and Budget shall consult with agencies and other persons to develop guidance and standard clauses for contracts. Each agency shall revise its future grant agreements to permit and encourage its grantees to use an alternative means of dispute resolution with respect to any dispute with a subgrantee, contractor, or other adverse party, which the grantee would be permitted to use with respect to dispute with the Federal Government.

(2) Within one year after the date of enactment of this Act, the Civilian Agency Acquisition Council and the Defense Acquisition Council, in consultation with the Administrative Conference of the United States, shall adopt any amendments to the Federal Acquisition Regulation, or propose any statutory changes, necessary to adopt acquisition procedures to the requirements of the dispute resolution process.

SEC. 4. ADMINISTRATIVE PROCEDURES.

(a) ADMINISTRATIVE HEARINGS.—Section 556(c) of title 5, United States Code, is amended—

(1) in paragraph (6) by inserting before the semicolon at the end thereof: "or by the use of alternative means of dispute resolution as provided by subchapter IV of this chapter"; and

(2) by redesignating paragraphs (7) through (9) through (11), respectively and inserting after paragraph (6) the following new paragraphs:

"(7) inform the parties as to the availability of one or more alternative means of dispute resolution, and encourage use of such methods;

"(8) require the attendance at any conference held pursuant to section (6) of at least one representative of each party who has authority to negotiate concerning resolution of issues in controversy;".

(b) ALTERNATIVE MEANS OF DISPUTE RESOLUTION.—Chapter 5 of title 5, United States Code, is amended by adding at the end thereof the following new subchapter:

"SUBCHAPTER IV—ALTERNATIVE MEANS OF DISPUTE RESOLUTION IN THE ADMINISTRATIVE PROCESS

§ 581. Definitions

"For the purposes of this subchapter—

"(1) 'agency' has the same meaning as in section 551(1) of this title;

"(2) 'administrative program' means any program administered by an agency and includes a Federal function which involves protection of the public interest and the determination of rights, privileges, and obligations of private persons through rulemaking, adjudication, licensing, or investigation, as such terms are used in section 551 of this title;

"(3) 'alternative means of dispute resolution' means any procedure that is voluntarily used to resolve issues in controversy, including but not limited to, settlement negotiations, conciliation, facilitation, mediation, factfinding, minitrials, and arbitration, or any combination thereof;

"(4) 'dispute resolution communication' means any oral or written communication or conduct made in confidence in connection with a dispute resolution proceeding by any party, neutral, nonparty participant, or other source of information relevant to the proceeding;

"(5) 'dispute resolution document' means any written material that is—

"(A) prepared for the purpose of, in the course of, or pursuant to a settlement proceeding, including memoranda, notes, and work product of the neutral and the parties; or

"(B) provided to the neutral or other parties in confidence for purposes of the dispute resolution proceeding;

an agreement of arbitral award reached as a result of a dispute resolution proceeding is not a dispute resolution document unless the parties agree in writing and the law otherwise allows that it shall be regarded as such;

"(6) 'dispute resolution proceeding' means any process in which an alternative means of dispute resolution is used to resolve an issue in controversy in which a neutral is appointed and indentified parties participate;

"(7) 'in confidence' means that the information is provided—

"(A) with the expressed desire of the source that it not be disclosed; or

"(B) under circumstances that would create the reasonable expectation on behalf of the source that the information will not be disclosed;

"(8) 'issue in controversy' means a question that is material to a decision concerning an administrative program about which persons who would be substantially affected by the decision or agency disagree;

"(9) 'neutral' means an individual who, with respect to an issue in controversy, serves as a conciliator, facilitator, mediator, factfinder, or arbitrator, or otherwise functions specifically to aid the parties in resolving the controversy;

"(10) 'party' means—

"(A) for proceedings with designated parties, the same as in section 551(3) of this title; and

"(B) for proceedings without designated parties, a person who will be significantly affected by the decision and who participates in the proceeding;

"(11) 'person' has the same meaning as in section 551(2) of this title; and

"(12) 'roster' means a list of persons qualified to provide services as neutrals.

"§ 582. General authority

"(a) Each agency may use a dispute resolution proceeding for the resolution of any issue in controversy that relates to an administrative program, if the parties agree to such procedures.

"(b) In determining whether the use of a dispute resolution proceeding is appropriate, an agency and the parties shall consider whether—

"(1) a definitive or authoritative resolution of the matter is required for precedential value and, if so, whether such as proceeding is likely to be accepted generally as an authoritative precedent;

"(2) the matter involves or may bear upon significant questions of Government policy that require additional procedures before a final resolution may be made a[illegible] so, whether such a proceeding may serve to develop a recommended policy for the agency;

"(3) maintaining established policies is of special importance, so that variations among individual decisions are not increased, and, if so, whether such a proceeding would likely reach consistent results among individual decisions;

"(4) the matter significantly affects persons or organizations who are not parties to the proceeding;

"(5) a full public record of the proceeding is important and, if so, whether a dispute resolution proceeding can provide such a record; and

"(6) the agency must maintain continuing jurisdiction over the matter with authority to alter the disposition in the light of changed circumstances and, if so, whether a dispute resolution proceeding would interfere with the agency's fulfilling that requirement.

"§ 583. Neutrals

"(a) A neutral may be a permanent or temporary government employee or a private individual who is acceptable to the parties to a dispute resolution proceeding. A neutral shall have no official, financial, or personal conflict of interest with respect to the issues in controversy, unless such interest is fully disclosed in writing and all parties agree that the neutral may serve.

"(b) A neutral who serves as a conciliator, facilitator, or mediator serves at the will of the parties.

"§ 584. Confidentiality

"(a) A neutral in a dispute resolution proceeding shall not voluntarily nor through discovery or compulsory process be required to disclose or testify concerning any dispute resolution document or any dispute resolution communication, unless—

"(1) all parties to the dispute resolution proceeding and the neutral consent in writing, and if the dispute resolution communication or dispute resolution document was provided by a nonparty participant, that participant also consents in writing;

"(2) the request is for a document that was provided to the neutral in a public meeting or is otherwise already in the public domain;

"(3) the dispute resolution communication or dispute resolution document is required by statute to be made public, but only if no other person is reasonably available to provide the document or disclose the communication; the neutral shall make a good-faith effort to inform the parties to a dispute resolution proceeding as early as possible or any such requirements that may be relevant; or

"(4) a court determines that such testimony or disclosure is necessary to—

"(A) prevent a manifest injustice,

"(B) reveal a violation of law, or

"(C) protect the public health or safety

of sufficient magnitude in the particular case to outweigh the integrity of dispute resolution proceedings in general by reducing the confidence of parties in future cases that their communications will remain confidential.

"(b) A party to a dispute resolution proceeding shall not voluntarily nor through discovery or compulsory process be required to disclose or testify concerning any dispute resolution document or any dispute resolution communication, unless—

"(1) all parties to the dispute resolution proceeding consent in writing;

"(2) the request is for a document already in the public domain;

"(3) the dispute resolution communication or dispute resolution document is required by statute to be made public;

"(4) such testimony or disclosure is necessary to—

"(A) prevent a manifest injustice,

"(B) reveal a violation of law, or

"(C) protect the public health and safety

of sufficient magnitude in the particular case to outweigh the integrity of dispute resolution proceedings in general by reducing the confidence of parties in future cases that their communications will remain confidential; or

"(5) the dispute resolution document or dispute resolution communication is relevant to the resolution of a dispute concerning existence or meaning of an agreement that resulted from the proceeding or to the enforcement of such an agreement or award.

"(c) The parties may—

"(1) agree that subsections (a) or (b) will not apply to their dispute resolution proceeding; or

"(2) modify the terms of subsection (a) or (b) by agreement in which case that agreement will prevail to the extent authorized by law.

The parties shall inform the neutral prior to the commencement of the dispute resolution proceeding of any modifications to the provisions of subsection (a) that will govern the confidentiality of the dispute resolution proceeding. If the parties do not so inform the neutral, subsection (a) shall apply.

"(d) If a demand, by way of discovery request or other legal process, is made for disclosure by the neutral of a dispute resolution document or dispute resolution communication, the neutral shall make reasonable efforts to notify the parties and any affected nonparty participants. Any party or affected nonparty participant that is provided such notice and does not offer to defend the refusal of the neutral or disclose or testify concerning the dispute resolution communication or dispute resolution document shall be regarded as waiving any objection to such disclosure or testimony.

"(e) Nothing in this section shall prevent the discovery or admissibility of any evidence that is otherwise discoverable merely because it was presented in the course of a dispute resolution proceeding.

"(f) Subparagraphs (a) and (b) shall have no effect on the information and data that are required to document an agreement or order nor on the parts of a dispute resolution proceeding that are or are not open to the public either as a matter of law or policy.

"(g) Subsections (a) and (b) do not prevent the gathering of information for statistical or research purposes or educational efforts in cooperation with other agencies, governmental entities, or dispute resolution programs, so long as the parties or the specific issues in controversy are not identifiable.

"(h) Subsections (a) and (e) do not apply to any action concerning a dispute between the neutral in a dispute resolution proceeding and a party or participant, but only to the extent that the communication document or is used resolving that dispute and not any issue in controversy in the dispute resolution proceeding.

"§ 585. Authorization of arbitration

"(a)(1) Arbitration as provided by this subchapter may be used whenever all parties consent, either before or after a dispute has arisen. An agency may not require any person to consent to arbitration as a condition of entering into a contract or obtaining any benefit. A party may agree to—

"(A) submit only certain issues in controversy to arbitration; or

"(B) arbitration on the condition that the award must be within a range of possible outcomes.

"(2) Any arbitration agreement that sets forth the subject matter submitted to the arbitrator shall be in writing.

"(b) Any agency official may offer to use arbitration for the resolution of issues in controversy, if such official—

"(1) has authority to enter into settlement stipulations concerning a matter; or

"(2) is otherwise specifically authorized by the agency to consent to use of arbitration.

"§ 586. Enforcement of arbitration agreements

"An agreement to arbitrate is enforceable pursuant to section 4 of title 9, United States Code, and no action brought to enforce such an agreement shall be dismissed nor shall relief therein be denied on the grounds that it is against the United States or that the United States is an indispensable party.

"§ 587. Arbitrators

"(a) The parties shall be entitled to participate in the selection of the arbitrator.

"(b) The arbitrator shall be a neutral who meets the criteria of section 583 of this title.

"§ 588. Authority of the arbitrator

"An arbitrator to whom a dispute is referred under this subchapter may—

"(1) regulate the course of and conduct arbitral hearings;

"(2) administer oaths and affirmations;

"(3) issue subpoenas for attendance of witnesses and production of evidence at the hearing, enforceable under the provisions of section 7 of title 9, United States Code, except that no subpoena shall be issued except for material that is clearly relevant to the resolution of the issues and is necessary to achieve justice in the matter; and

"(4) make awards.

"§ 589. Arbitration proceedings

"(a) The arbitrator shall set a time and place for the hearing and notify the parties not less than five days prior to the hearing.

"(b) Any party wishing a stenographic record of the hearing shall—

"(1) be responsible for the preparation of such record;

"(2) notify the other parties and the arbitrator of the preparation of such record;

"(3) furnish copies to all parties and the arbitrator; and

"(4) pay all costs for such record, unless the parties agree otherwise or the arbitrator determines that cost should be apportioned.

"(c)(1) The parties are entitled to be heard, to present evidence material to the controversy, and to cross-examine witnesses appearing at the hearing.

"(2) The arbitrator may, with the consent of the parties, conduct all or part of the hearing by telephone, television, computer, or other electronic means, if each party has an opportunity to participate.

"(3) The hearing shall be conducted expeditiously and in an informal manner.

"(4) The arbitrator may receive any oral or documentary evidence, except that irrelevant, immaterial, unduly repetitious, or privileged evidence may be excluded by the arbitrator.

"(5) The arbitrator shall interpret and apply relevant statutory and regulatory requirements, legal precedents, and policy directives.

"(d) No interested person shall make or knowingly cause to be made to the arbitrator an unauthorized ex parte communication relevant to the merits of the proceeding, unless the parties agree otherwise. If a communication is made in violation of this subsection, the arbitrator shall assure that a memorandum of the communication is prepared and made a part of the record, and that an opportunity for rebuttal is allowed. Upon receipt of a communication made in violation of this subsection, the arbitrator may, to the extent consistent with the interests of justice and the policy underlying this subchapter, require the offending party to show cause why his claim of such party should not be resolved against the offending party as a result of the improper conduct.

"(e) The arbitrator shall make the award within thirty days of the close of the hearing, including the filing of any briefs authorized by the neutral, unless—

"(1) the parties agree to some other time limit; or

"(2) the agency provides by rule for some other time limit.

"§ 590. Arbitration awards

"(a) Unless the agency provides otherwise by rule, the award in an arbitration proceeding shall include a brief, informal discussion of the factual and legal basis, but formal findings of fact or conclusions of law shall not be required. The award shall be filed with all relevant agencies, along with proof of service on all parties by the prevailing party.

"(b) The award shall be final and binding on the parties to the matter, and may be enforced pursuant to section 9 of title 9, United States Code. No action brought to enforce such an agreement shall be dismissed nor shall relief therein be denied on the grounds that it is against the United States or that the United States is an indispensable party.

"(c) An award entered under this subchapter may not serve as an estoppel in any other proceeding for any issue that was resolved in the proceeding, nor may the award be used as precedent or otherwise be considered in any proceeding, whether conducted under this subchapter, by an agency, in a court, or in any other arbitral proceeding.

"§ 591. Judicial review

"(a) Any person adversely affected or aggrieved by an award made in a proceeding conducted under this subchapter may bring an action only pursuant to the provisions of sections 9 through 13 of title 9, United States Code.

"(b) Section 10 of title 9, United States Code, is amended by adding a new subsection (f) that reads as follows:

" '(f) Where the award was issued pursuant to section 595 of title 5, United States Code, if in consideration of the factors listed in section 589(b) of title 5, the consent of the agency to use arbitration to resolve the issues in controversy was a gross abuse of discretion.'.

"(c) Any agency action relating to decisions to use or not to use a dispute resolution proceeding shall not be subject to judicial review. Any agency action relating to a decision to terminate an arbitration proceeding conducted pursuant to this subchapter shall be subject to judicial review only as provided in section 589(b) of title 5, United States Code, and section 10(f) of title 9, United States Code.

"§ 592. Authorization to use services of employees of other agencies

"An agency may use the services of one or more employees of other agencies to serve as neutrals in dispute resolution proceedings. The agencies may enter into an interagency agreement that provides for the reimbursement by the user agency or the parties of the full or partial cost of the services of an employee.

"§ 593. Qualifications and roster of neutrals; procurement

"(a) In consultation with the Federal Mediation and Conciliation Service, the Community Relations Service of the Department of Justice, and professional organizations in the area of dispute resolution, the Administrative Conference of the United States may—

"(1) establish standards for neutrals (including experience, training, affiliations, diligence, actual or potential bias or conflicts of interest, and other qualifications) to which agencies may refer;

"(2) maintain a roster of individuals who meet such standards and are otherwise qualified to act as neutrals, which shall be made available upon request;

"(3) enter into contracts for the services of neutrals that may be used by agencies on an elective basis in dispute resolution proceedings; and

"(4) develop procedures that permit agencies to obtain the services of neutrals on an expedited basis.

"(b) Any agency may contract with any person on a roster established under subsection (a) or a roster maintained by other public or private organizations or individuals for services as a neutral, or for training in connection with alternative means of dispute resolution. An agency may enter into an interagency agreement with the Administrative Conference of the United States to contract for the services of any person on a roster established under subsection (a) to serve as a neutral. The agency shall pay for the services of the neutral. An agency may negotiate a contract for the services of a neutral with any qualified person at compensation that the agency determines is fair and reasonable to the Government.

"§ 594. Support services

"(a) The Administrative Conference of the United States shall compile and maintain data on the use of alternative means of dispute resolution in conducting agency proceedings. Agencies shall supply such additional information required to enable the Chairman of the Administrative Conference of the United States to comply with this subsection. The Administrative Conference of the United States shall transmit periodic reports to the Congress containing data and recommendations concerning the use of alternative means of dispute resolution.

"(b) The Chairman of the Administrative Conference of the United States may pay all or part of the expenses of using an alternative means of dispute resolution. Such expenses may include, but are not limited to, the costs of neutrals, the costs for certain parties determined to be eligible for assistance in accordance with section 595, administrative costs, and training costs. The determinations with respect to payments under this section shall be at the discretion of the Chairman in furthering the use of alternative means of dispute resolution by Federal agencies.

"(c) For the purposes of this subchapter, an agency may use the services and facilities of other Federal agencies and public and private agencies, and individuals (with or without reimbursement) with the consent of such agencies and individuals. An agency may accept such voluntary and uncompensated services without regard to the provisions of section 1342 of title 31, United States Code.

"§ 595. Funding of participation

"(a)(1) Any agency may pay a reasonable amount to enable participation, if the agency determines that—

"(A) it is in the public interest to obtain the participation of one or more persons in a dispute resolution proceeding; and

"(B) such persons are unable to participate without receiving financial assistance to reimburse expenses.

"(2) In making a determination under paragraph (1) the agency shall consider—

"(A) the need for representation in the proceeding of a fair balance of interests;

"(B) the complexity and importance of the issues involved; and

"(C) the potential savings to the Government of using the particular type of proceeding instead of another procedure to resolve the issue in controversy.

"(b) A person seeking financial assistance, to reimburse expenses of participation in an alternative means of dispute resolution, may submit an application to the Chairman of the Administrative Conference of the United States requesting such assistance. No such application shall be considered by the Chairman, unless the agency notifies the Chairman in writing of a determination under subsection (a) that participation by such person in the alternative proceeding is necessary and in the public interest.

"(c)(1) Agency funds used to defray the travel expenses of any advisory committee as authorized by section 7 of the Federal Advisory Committee Act (5 U.S.C. App. 2) shall be from the general funds of the agency, and not from any amount restricted to travel from appropriations to the agency.

"(2) For the purpose of paragraph (1), the term 'advisory committee' shall have the same meaning as such term is defined under section 3(2) of the Federal Advisory Committee Act (5 U.S.C. App. 2).".

(c) TECHNICAL AMENDMENT.—The table of sections for chapter 5 of title 5, United States Code, is amended by adding at the end thereof the following:

"SUBCHAPTER IV—ALTERNATIVE MEANS OF DISPUTE RESOLUTION IN THE ADMINISTRATIVE PROCESS

"581. Definitions.
"582. General authority.
"583. Neutrals.
"584. Confidentiality.
"585. Authorization of arbitration.
"586. Enforcement of arbitration.
"587. Arbitrators.
"588. Authority of the arbitrator.
"589. Arbitration proceedings.
"590. Arbitration awards.
"591. Judicial review.
"592. Authorization to use services of employees of other agencies.
"593. Qualifications and roster of neutrals; procurement.
"594. Support services.
"595. Funding or participation.".

SEC. 5. GOVERNMENT CONTRACT CLAIMS.

(a) CONTRACTING OFFICERS.—Section 6(a) of the Contract Disputes Act of 1978 (41 U.S.C. 605(a)) is amended by adding at the end thereof: "The contracting officer shall make all reasonable efforts to resolve a claim or dispute consensually, before or after making a decision under this section.".

(b) ALTERNATIVE MEANS OF DISPUTE RESOLUTION.—Section 7 of the Contract Disputes Act of 1978 (41 U.S.C. 606) is amended—

(1) by redesignating such section as subsection (a) of section 7; and

(2) adding at the end thereof the following new subsections:

"(b) No provision of this Act may be construed to prevent the contract and a contracting officer from using any alternative means of dispute resolution under subchapter IV of title 5, United States Code, or other mutually agreeable procedures for resolving claims including binding arbitration of claims not in excess of $250,000. Any agency action relating to decisions to use or not to use a dispute resolution proceeding shall not be subject to judicial review. Any agency action relating to a decision to terminate an arbitration proceeding conducted pursuant to this subchapter shall be subject to judicial review only as provided in section 589(b) of title 5, United States Code, and section 10(f) of title 9, United States Code.

"(c) Agencies' authorization to engage in arbitration pursuant to section (b) shall cease to be effective on October 1, 1995, except that it shall continue in effect with respect to then pending arbitration proceedings which, in the judgment of the agencies that are parties to such proceedings, require continuation until such arbitrations terminate.".

(c) EXPEDITED PROCESS.—Section 8(f) of the Contract Disputes Act of 1978 (41 U.S.C. 607(f)) is amended by striking out "$50,000" and inserting in lieu thereof "$250,000".

(d) JUDICIAL REVIEW OF ARBITRAL AWARDS.—Section 8(g) of the Contract Disputes Act of 1978 (41 U.S.C. 607(g)) is amended by adding at the end thereof the following subsection:

"(3) All aspects of an award by an arbitrator shall be reviewed pursuant to sections 9 through 13 of title 9, United States Code, except that the court may set aside any award that is found to violate limitations imposed by Federal statute.".

SEC. 6. FEDERAL MEDIATION AND CONCILIATION SERVICE.

Section 203 of the Labor Management Relations Act, 1947 (29 U.S.C. 173), is amended by adding at the end thereof the following new subsection:

(f) The Service may make its services available to Federal agencies to aid in resolution of disputes under the provisions of subchapter IV of title 5, United States Code. Functions performed by the Service may include, but are not limited to, assisting parties to disputes relating to administrative programs, training persons in skills and procedures employed in alternative dispute resolution, and furnishing personnel to act as neutrals, as defined in section 581 of title 5, United States Code. Personnel assigned to act as neutrals should be qualified in accordance with section 593 of title 5, United States Code. The Service may consult and cooperate with the Administrative Conference of the United States and other agencies in maintaining rosters of neutrals and arbitrators, and to adopt such procedures and rules as necessary to carry out the services authorized in this subsection.".

SEC. 7. GOVERNMENT TORT AND OTHER CLAIMS.

(a) Section 2672 of title 28, United States Code, is amended by inserting at the end of the first sentence the following: "except that any such award, compromise, or settlement may be effected without prior written approval to the extent the authority to do so is delegated to the head of the agency by the Attorney General of the United States. Such delegations may not exceed the authority delegated by the Attorney General to the United States attorneys to settle claims for money damages against the United States. Each Federal agency may use arbitration, or other means of dispute resolution under the provisions of subchapter IV of title 5, United States Code, to settle any tort claim against the United States, not in excess of the agency's authority to award, compromise, or settle without prior written approval of the Attorney General or his designee. Any agency action relating to decisions to use or not to use a dispute resolution proceeding under this section shall not be subject to judicial review, except as provided by section 589(b) of title 5, United States Code.".

(b) Section 3711(a)(2) of title 31, United States Code, is amended by striking out "$20,000" and inserting in lieu thereof "$250,000".

SEC. 8. USE OF NONATTORNEYS.

(a) REPRESENTATION OF PARTIES.—Each agency, in developing a policy on the use of alternative means of dispute resolution under this Act, shall identify any of its administrative programs with numerous claims or disputes before the agency and determine—

(1) the extent to which individuals are represented or assisted by attorneys or by persons who are not attorneys; and

(2) whether the subject areas of the applicable proceedings or the procedures are so complex or specialized that only attorneys may adequately provide representation or assistance.

(b) REPRESENTATION AND ASSISTANCE BY NONATTORNEYS.—A person who is not an attorney may provide representation or assistance to any individual in a claim or dispute with an agency, if—

(1) such claim or dispute concerns an administrative program identified under subsection (a);

(2) such agency determines that the proceeding or procedure does not necessitate representation or assistance by an attorney under subsection (a)(2); and

(3) such person meets any requirement of the agency to provide representation or assistance.

(c) DISQUALIFICATION OF REPRESENTATION OR ASSISTANCE.—Any agency that adopts regulations under this section to permit representation or assistance by persons who are not attorneys shall review the rules of practice before such agency to—

(1) ensure that any rules pertaining to disqualification of attorneys from practicing before the agency shall also be made applicable as appropriate to other persons who provide representation or assistance; and

(2) establish effective agency procedures for enforcing such rules of practice and for receiving complaints from affected persons.

SEC. 9. AUTHORIZATION OF APPROPRIATIONS.

To carry out this Act, and notwithstanding section 576 of title 5, United States Code, there are authorized to be appropriated to the Administrative Conference of the United States amounts not in excess of $1,000,000 for each of the fiscal years 1990, 1991, and 1992.

STATEMENT OF SENATOR CHARLES E. GRASSLEY BEFORE THE COMMITTEE ON GOVERNMENT AFFAIRS SUBCOMMITTEE ON OVERSIGHT ON S. 971

SEPTEMBER 19, 1989

MR. CHAIRMAN, I THANK YOU FOR HOLDING THIS HEARING ON S. 971, THE ADMINISTRATIVE DISPUTE RESOLUTION ACT, A BILL DESIGNED TO ENCOURAGE PROMPT, INFORMAL, AND INEXPENSIVE RESOLUTION OF ADMINISTRATIVE DISPUTES INVOLVING FEDERAL AGENCIES.

THE 18TH CENTURY FRENCH PHILOSOPHER, VOLTAIRE, ONCE OBSERVED: "ONLY TWICE IN MY LIFE HAVE I FELT UTTERLY RUINED -- ONCE WHEN I LOST A LAWSUIT, AND ONCE WHEN I WON." IT'S LIKELY THAT VOLTAIRE'S LAMENT IS OFTEN REPEATED 200 YEARS LATER BY INDIVIDUALS AND BUSINESSES PUT THROUGH THE LITIGATION RINGER BEFORE FEDERAL AGENCIES.

TODAY, TENS OF THOUSANDS OF ADMINISTRATIVE AGENCY DECISIONS AND COURT CASES ARE TODAY HANDLED THROUGH HIGHLY ADVERSARIAL PROCEDURES THAT ARE ALL TOO OFTEN COMPLEX, COSTLY AND LENGTHY. IN THE PRIVATE SECTOR, CONSENSUAL DISPUTE RESOLUTION HAS LONG BEEN USED TO GREAT ADVANTAGE TO PRODUCE QUICKER, BETTER, LESS EXPENSIVE DECISIONS. AND A HOST OF STATE GOVERNMENTS HAVE ADOPTED "MULTI-DOOR COURTHOUSES, TO FACILITATE ALTERNATIVES TO TRADITIONAL LITIGATION.

THESE METHODS -- OFTEN REFERRED TO AS "ALTERNATIVE DISPUTE RESOLUTION" (ADR) -- INCLUDE ARBITRATION, NEGOTIATION, MEDIATION, AND MINITRIALS, AMONG OTHERS.

THE FEDERAL GOVERNMENT -- AND IN PARTICULAR FEDERAL AGENCIES -- HAVE MUCH TO LEARN FROM THESE EXPERIENCES.

OVER THE PAST 50 YEARS, AS WE'VE SEEN THE FEDERAL BUREAUCRACY SPRAWL IN EVERY DIRECTION, A VARIETY OF AGENCY BOARDS AND OFFICES HAVE BEEN ESTABLISHED. WHOLE NEW SPECIALTIES OF LAWYERS HAVE SPRUNG UP TO CARRY ON LITIGATION OVER ENERGY, CONTRACT, ENVIRONMENTAL, SAFETY AND OTHER MATTERS. UNFORTUNATELY, EXISTING AGENCY PROCEDURES OFTEN SERVE TO INCREASE THE CONTENTIOUSNESS OF PARTIES TO THE ADMINISTRATIVE PROCESS. AGENCY PROCEDURES, ONCE DESIGNED TO BE STREAMLINED, HAVE COME TO "MIMIC" THOSE OF OUR OVERBURDENED COURTS -- WITH SIMILAR RESULTS.

AN INCREASE IN AGENCY LITIGATION IS UNDOUBTEDLY GOOD FOR THE BUSINESS OF THE MORE THAN 600,000 U.S. LAWYERS NOW IN PRACTICE. BUT LAWYERS CANNOT MAKE OUR "ECONOMIC PIE" GROW LARGER -- THEY CAN ONLY ARGUE OVER HOW TO CARVE IT UP. WITH LEGAL EXPENDITURES GROWING AT A FASTER RATE THAN THE GROSS

NATIONAL PRODUCT, OUR NATION'S OVERALL PRODUCTIVITY IS ALMOST CERTAINLY HARMED BY THIS DRAIN ON VALUABLE RESOURCES.

OTHER COSTS OF AGENCY LITIGATION, SUCH AS DELAY, LOST OPPORTUNITIES, AND FRUSTRATION, CANNOT BE MEASURED SO EASILY, BUT ARE JUST AS REAL.

ENTHUSIASM FOR ADR STEMS FROM THE HOPE THAT IT WILL REDUCE THIS BURDEN ON COURTS, AGENCIES, AND THE ECONOMY, AS WELL AS PROVIDE MORE SATISFYING MEANS OF JUSTICE.

THE FEDERAL GOVERNMENT IS IN AN IDEAL POSITION TO BE IN THE FOREFRONT OF ALTERNATIVE DISPUTE RESOLUTION. INSTEAD, WITH A FEW EXCEPTIONS, MOST FEDERAL AGENCIES LAG FAR BEHIND PRIVATE AND OTHER PUBLIC ENTITIES THAT MUST RESOLVE DISPUTES. ADR MUST CEASE BEING A SUBJECT THAT RECEIVES ALMOST UNIVERSAL ENDORSEMENT IN THEORY, BUT SUBSTANTIALLY LESS IN PRACTICE.

MR. CHAIRMAN, THE "ADMINISTRATIVE DISPUTE RESOLUTION ACT" IS DESIGNED TO ENCOURAGE AND EXTEND THE USE OF ADR BY FEDERAL AGENCIES. IMPORTANTLY, HOWEVER, S. 971 IS NOT HEAVY-HANDED. IT DOESN'T COMPEL FEDERAL AGENCIES TO DO ANYTHING. INDEED, THE GOALS OF S. 971 ARE QUITE MODEST:"TO INCREASE VOLUNTARY EFFORTS BY AGENCIES TO RESOLVE DISPUTES BY MEANS OTHER THAN TRADITIONAL LITIGATION.

EVEN WITH THIS UNDERSTATED APPROACH, THE BILL WILL GIVE IMPETUS FOR MEANINGFUL CHANGE BY SENDING A CLEAR SIGNAL TO AGENCIES, REVIEWING COURTS AND REGULATED PERSONS THAT INFORMED, THOUGHTFUL EFFORTS TO USE ADR IT WILL BE SUPPORTED.

THE BILL AMENDS THE ADMINISTRATIVE PROCEDURE ACT TO AUTHORIZE THE PARTIES TO AGREE TO USE MEDIATION, OR OTHER MUTUALLY AGREEABLE PROCESSES TO RESOLVE FEDERAL DISPUTES. BY AUTHORIZING PARTIES TO USE THE PROCESS TO FIT THE CASE-AT-HAND, THIS BILL AFFORDS A GOOD DEAL OF FLEXIBILITY. MUTUAL ASSENT IS REQUIRED. NO PARTY -- GOVERNMENT OR PRIVATE -- SHALL BE COMPELLED UNDER S. 971 TO USE ALTERNATIVE MEANS OF DISPUTE RESOLUTION.

SPECIFIC STATUTORY PROVISIONS THAT INHIBIT EFFECTIVE NEGOTIATION -- FOR INSTANCE, PARTS OF THE FEDERAL TORT CLAIMS ACT AND CONTRACT DISPUTES ACT -- ARE AMENDED. THE BILL ALSO REPEALS THE G.A.O.'S OVERLY RESTRICTIVE PROHIBITION ON ARBITRATION IN CASES WHERE ARBITRATION CAN BE USED CONSISTENT WITH THE PUBLIC INTEREST.

IMPORTANTLY, S. 971 RECOGNIZES THAT ADR IS NOT APPROPRIATE FOR ALL CASES INVOLVING THE GOVERNMENT, JUST AS WITH PRIVATE DISPUTES. INDEED, THE BILL SETS OUT ENTIRE CATEGORIES OF CASES IN WHICH ADR MAY NOT BE PRUDENT, SUCH AS WHEN PRECEDENT IS IMPORTANT, OR WHEN SERIOUS POLICY MATTERS ARE AT STAKE, OR WHEN

OTHERS NOT A PARTY WILL BE SUBSTANTIALLY AFFECTED. THERE ARE OTHER SITUATIONS AS WELL.

HOWEVER, AS A CONSTITUTIONAL MATTER, THE VOLUNTARY ASSIGNMENT BY EXECUTIVE BRANCH AGENCY HEADS OF DISCRETE ISSUES TO ARBITRATION NEED NOT GIVE RISE TO SEPARATION OF POWERS CONCERNS.

THESE INITIATIVES WILL BE COMPLIMENTED BY INFORMED, PERIODIC, CONGRESSIONAL OVERSIGHT, AND BY CREATION OF INCENTIVES FOR HIGH LEVEL EXECUTIVE BRANCH OFFICIALS AND OTHER AGENCY PERSONNEL TO USE ADR.

MR. CHAIRMAN, IT IS A TRUISM TO SAY THAT JUSTICE DELAYED OR EXCESSIVELY COSTLY IS JUSTICE DENIED. ADMINISTRATIVE JUSTICE NEED NOT BE SO EXPENSIVE OR TIME-CONSUMING. CONGRESS AND THE EXECUTIVE SHOULD ACCEPT THE CHALLENGE OF FASHIONING A BETTER AGENCY APPROACH TO DISPUTE RESOLUTION. THE SUCCESS OF ADR IN OTHER ARENAS MAKE LIKELY SIMILAR SUCCESS ON THE FEDERAL LEVEL.

I HOPE MY COLLEAGUES WILL SEE THE MERIT IN THIS APPROACH AND JOIN ME IN SUPPORT OF S. 971. AGAIN, I THANK YOU HOLDING THIS HEARING, MR. CHAIRMAN, AND I LOOK FORWARD TO WORKING WITH YOU ON THIS MEASURE.

STATEMENT OF
EDWARD E. REICH
ACTING ASSISTANT ADMINISTRATOR
OFFICE OF ENFORCEMENT AND COMPLIANCE MONITORING
U.S. ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE
SUBCOMMITTEE ON OVERSIGHT OF GOVERNMENT MANAGEMENT
COMMITTEE ON GOVERNMENT AFFAIRS
UNITED STATES SENATE

September 19, 1989

Good morning, Mr. Chairman and members of the Subcommittee. I am pleased to appear before you today to discuss the United States Environmental Protection Agency's (EPA) experience with alternative dispute resolution (ADR) techniques and the Agency's analysis of and comments on S. 971, the "Administrative Dispute Resolution Act of 1989." EPA supports the practice of using ADR in certain disputes involving many federal agencies and is of the opinion that S. 971 contains most of the necessary elements of a tool for implementing such practice. Both the Administrator of EPA, William K. Reilly, and the Deputy Administrator, F. Henry Habicht II, have spoken in support of the use of ADR. In fact, at a recent Agency-hosted meeting on EPA's use of negotiated rulemaking and ADR, attended by senior American and French jurists, Administrator Reilly remarked that he has a strong professional and personal interest in the subject of informal dispute resolution, and that ADR methods should be more extensively utilized within the federal government. We believe EPA has demonstrated leadership in incorporating ADR techniques in its regulatory and enforcement programs and that the benefits we have witnessed could be achieved by other agencies.

The Agency is convinced of the effectiveness of ADR processes, utilizes them to facilitate several aspects of its enforcement and regulatory activities, and continues to explore ways to increase the appropriate uses of ADR. Specifically, the Agency has used ADR mechanisms to expedite resolution of protracted enforcement disputes, to lessen the potential that future disputes will require legal action, to expedite development of several key regulations, and to facilitate effective discussions with community and industry representatives.

As members of the Subcommittee are aware, alternatives to litigation as a means of dispute resolution have long been utilized in the private sector to resolve contractual and commercial disputes. Alternative dispute resolution processes have not, however, been widely used in the public sector, and particularly by federal agencies, to resolve disputes which arise out of regulatory conflicts or enforcement cases. EPA believes that S. 971 may be a positive step toward encouraging the use of appropriate ADR processes into federal agency practices.

This is not to say, however, that the bill is perfect. EPA has several areas of concern including whether protected documents are subject to disclosure under the Freedom of Information Act and the applicability of the bill to grants and other assistance agreements. As to the grants question, Section 3 (d) (1) of the bill requires agencies to amend their standard contract, grant and other assistance agreements to authorize and encourage ADR where disputes arise under future grant agreements to allow and foster the use of ADR by grantees in resolving disputes with other parties.

EPA believes Section 3(d)(1) should be amended to delete the reference to grants and other assistance agreements. This will help ensure that agencies continue to make program officials who implement legislative policy objectives through assistance agreements responsible for dispute resolution. Agencies would, of course, continue to be able to use alternative means to resolve assistance disputes as a matter of discretion. Several agencies, including EPA, resolve disputes involving grants and other assistance agreements through the use of informal, nonlegalistic procedures administered by program managers.

Moreover, there appears to be no need for legislation authorizing the use of ADR by grantees. As a general rule, grantees may exercise broad discretion in resolving disputes with other parties. This is reflected in the government-wide regulations governing federal grants to state and local governments. For example, under those regulations, grantees and subgrantees are fee to resolve disputes arising out of procurements in accordance with good administrative practice and sound business judgment. This provision certainly includes the use of ADR.

EPA strongly supports Section 584 of the bill regarding the confidentiality of communications in the ADR process. Without this provision, parties may be reluctant or unwilling to consider the use of ADR. We suggest that the provision be clarified to ensure that protected documents are not subjected to disclosure under the

Freedom of Information Act. Under current case law, agencies may be required to release to the public, agency documents exchanged in dispute resolution proceedings.

Substantial incentives exist for the use of ADR processes by EPA. At this time of budgetary constraints and increasing statutorily mandated responsibilities, it is imperative that EPA make every effort to increase the effectiveness of its enforcement and regulatory activities. In this regard, the use of ADR processes may substantially shorten the time required to promulgate regulations, allow the Agency to process greater numbers of enforcement actions and achieve the environmental benefits of those actions, more quickly, and greatly enhance the effectiveness of other Agency activities.

ENFORCEMENT

In enforcement activities of various statutes within its jurisdiction, the Agency has found that ADR processes can be effective in expediting resolution of difficult settlement negotiations. Primarily, EPA utilizes ADR processes to provide assistance to Agency personnel in the negotiation of statutory civil violations. On average, over 90 percent of all civil actions initiated by EPA are resolved through settlement negotiations. Though most of these actions are effectively resolved through traditional negotiation methods, a number of complex and multiparty negotiations are greatly aided by the effective use of ADR processes to augment EPA settlement activities. The Agency has not, however, used ADR processes to replace the aggressive litigation of appropriate civil and criminal actions, but instead has used ADR as an aid to this overall goal.

In order to establish and foster the use of ADR processes in EPA enforcement activities, the Agency has established a National Enforcement ADR Program. On August 14, 1987, former Administrator Lee Thomas issued a "Guidance on Use of Alternative Dispute Resolution Techniques in Enforcement Actions". A copy of the Guidance is available for your information. This Agency-wide Guidance, which is one of the first of its kind among federal agencies, has the full support of EPA Administrator Reilly and establishes a preference for the use of ADR in appropriate enforcement cases. The Guidance provides basic information on ADR processes, suggests criteria for selection of cases for use of ADR and for selection of ADR professionals, and establishes procedures to employ ADR professionals and to approve cases for ADR use. Model ADR agreements and procedures for conduct of ADR processes are also included.

Issuance of the Guidance has been followed by an ongoing effort to educate Agency personnel about the advantages of ADR and to actively solicit appropriate cases for ADR assistance. Senior attorneys with extensive expertise in negotiations and ADR serve as resources for regional and headquarters staff in the selection of appropriate cases for ADR assistance and the employment of ADR professionals. Training of Agency staff and management in negotiation techniques and the use of other ADR processes is provided regularly. The Agency has been greatly aided in its efforts to utilize ADR processes.

ADR processes utilized by the Agency include mediation, fact-finding, arbitration, mini-trials, and settlement judges. The Agency has explored the use of ADR processes in more than a dozen enforcement and defense actions, including cases in all EPA enforcement programs. Of these efforts, three civil actions have been resolved through the use of mediation, and three others are now in mediated settlement negotiations. EPA has also utilized a minitrial to assist settlement negotiations. Additionally, a half dozen of the Agency's consent decrees provide for the use of mediation or fact-finding to resolve specified future disputes regarding compliance with the consent agreements should the parties fail to negotiate their disagreements.

As part of its Federal Facility Compliance Strategy, EPA has provided for the use of ADR processes in resolving disputes with other agencies. It is possible that ADR may provide, in the future, a useful approach in these situations.

Some examples of the Agency's use of ADR processes in the enforcement context are provided for your information.

oo Settlement Mediation - U.S. v City of Sheridan (Wyoming)
This was a civil action for violations of the Safe Drinking Water Act, involving numerous parties with a long history of mistrust and protracted negotiations. Parties included federal, state, and local governments, industry and local citizen organizations. After

extended unsuccessful negotiations between EPA and the City of Sheridan, the parties, with assistance from EPA, employed a professional mediator to facilitate settlement discussions. The mediator expanded discussions to include affected citizens and other affected interest groups allowing for a full review of the issues preventing settlement by the local government. A settlement agreement was obtained shortly after employ of the mediator. We believe that the ability to use ADR professionals in this situation provided an effective venue for settlement discussions that would not have existed under traditional negotiation methods.

oo Fact-Finding Settlement Provision - U.S. v Union Carbide Corp.

This civil action was initiated for violations of reporting requirements of the Toxic Substances Control Act. As part of the administrative settlement agreement, the parties included a section which provided that future factual disputes that arose over the company's compliance with statutory reporting requirements would be forwarded to a panel of neutral experts selected by the parties for factual determination prior to initiation of civil action for penalties by EPA. EPA agreed to submit the issues to the experts for a non-binding factual determination in deciding whether enforcement action was warranted.

oo Private Industry Mediation Services

Agency enforcement actions under the Superfund law often involve sites where liability for site cleanup costs are shared jointly and severally by numerous companies. Some hazardous waste sites involve hundreds of potentially liable companies, each legally liable for the full cost of site cleanup. This multiplicity of defendants makes traditional settlement negotiations extremely difficult. To assist the numerous codefendants to reach agreement on a common negotiating position for settlement discussions, private firms provide mediation expertise to industry. ADR services generally include mediation of the negotiations between the numerous liable defendants and data evaluation efforts to appropriately allocate the costs of cleanup among the defendants. The Agency wholly supports the efforts of such private ADR services firms. In many cases, the employment of private mediation services by liable industrial parties is crucial to the Agency's subsequent ability to complete settlement negotiations without resort to lengthy court procedures.

oo Small Claims Arbitration - CERCLA

EPA is investigating the use of ADR for statutory claims for which the compensation sought by the Agency is small in relation to the cost of traditional legal approaches to enforce the claim. The use of an arbitration process to determine the appropriate amount of recovery could save federal resources while expediting the resolution of claims. In this regard, EPA is preparing to implement the use of arbitration to establish claims by the Agency for costs under $500,000 expended under the Superfund program. Regulations addressing this effort have been published in the

Federal Register and have recently become effective.

oo Administrative Settlement Judges

The court-mandated use of jurists as settlement mediators in filed civil actions has been used with great success by several state and federal courts. In an effort to expedite the resolution of cases filed with the EPA administrative court system, the Agency's Administrative Law Judges (ALJ) have begun to use mediation in appropriate disputes prior to hearing. The ADR process will be conducted by an ALJ not associated with the substance of the dispute. EPA is currently training ALJ jurists in ADR techniques. EPA believes that the use of settlement judges will expedite the resolution of a number of Agency administrative actions.

CONSENSUAL APPROACHES TO REGULATION AND POLICY DEVELOPMENT

The Agency has found that under the right circumstances the use of ADR processes provides many benefits in terms of time and resources in the promulgation of regulations. The average time required for promulgation by EPA of a major regulation through the traditional method used by federal agencies is in excess of twenty-four months. This approach involves the Agency researching and preparing a draft regulation for publication in the Federal Register and subsequent response by the Agency to public comments. The regulation is then modified as deemed appropriate in response to comments by the Agency and promulgated in final form. The

Agency has found that this process generally requires EPA response to numerous duplicative public comments and in approximately 80% of the cases, results in the filing of legal action against the Agency.

In order to increase the efficiency of its rulemaking activities, EPA is committed to and is using negotiation and other consensus-building techniques, such as policy dialogues and research strategies, to develop regulations and policies. Negotiated rulemaking or regulatory negotiation (Reg-Neg) and policy dialogues are two of the most prominent ADR activities undertaken by the Agency. Both are consensus-building processes designed to improve communication between the Agency and the public.

oo Negotiated Rulemaking

A regulatory negotiation brings together EPA and representatives of affected interest groups (industry, environmentalists, citizens, unions, state and local governments, etc.) in a federally-chartered committee for public face-to-face negotiations. The committee's goal is to reach consensus on resolving the major issues or the actual language of a proposed rule. The Agency provides assistance to the committee by providing expertise in design and conduct of the Reg-Neg process, providing access to neutral facilitators and funding of EPA expenses, and facilitating communications between the parties and with OMB and congressional staff.

The Reg-Neg process results in both benefits and costs for the Agency. It presents an opportunity to build consensus among potential antagonists and thereby reduce litigation. It may also provide EPA with access to information important to the regulatory decision early in the process. On the other hand, Reg-Negs are time consuming for senior Agency staff and provide no guarantee that consensus will be reached and litigation avoided. Also, while successful Reg-Negs may save time, unsuccessful Reg-Negs may take more time as the Agency in such cases will have to go back to the normal rulemaking process. In addition, it may be difficult to pull together the parties that reflect all views and interests in regulatory issues.

EPA used the Reg-Neg process in development of seven regulations and is about to commence an eighth negotiation. Included are rules under the Toxic Substances Control Act (Asbestos in Schools, Emergency Pesticide Exemptions, and Farmworker Protection Standards), the Clean Air Act (Nonconformance Penalties for Heavy Duty Trucks, and Performance Standards for Woodburning Stoves), and the Resource Conservation and Recovery Act (RCRA Minor Permit Modifications, and Underground Injection Well Standards). In five of the seven efforts, the parties reached consensus on the proposed rule while the other two failed to achieve agreement. Of the six rules that have been issued as final regulations, only two have been challenged in court. In both cases the issues at trial were substantially reduced, resulting in expedited outcomes. In addition, we believe that public comments on all negotiated proposed regulations were substantially reduced due to the process. However, for the Farmworker Protection Standards Rulemaking consensus was not reached and the rule has not been finalized.

Agency assessment of the Reg-Neg program to date has determined that with careful selection of rulemaking projects negotiated rulemaking can produce proposed rules that meet statutory requirements which are pragmatic, innovative, environmentally effective, and which are more likely to be accepted by affected industries, concerned environmental groups, and other interested parties. Negotiated rulemaking is most appropriate in regulatory situations which involve the resolution of a limited number of related issues, none of which involve fundamental questions of value or extremely controversial national policy.

COMMUNITY RELATIONS ACTIVITIES

The siting of hazardous waste landfills and incinerators, and the cleanup of contaminated sites under statutory enforcement actions, are matters of extreme sensitivity and public concern. A siting or cleanup decision often raises public interest and desire for involvement in decisions affecting the site. Unfortunately, these situations often involve emotional and divisive positions which make discussions difficult. The Agency has found that employment of ADR professionals by the parties to such a dispute is extremely useful in facilitating discussions. A neutral professional can explore positions and ensure that all necessary parties are represented. This approach has been used by the Agency and state officials with success at several sites. We believe that use of ADR professionals to facilitate discussions with community and industry representatives greatly enhances the Agency's ability to make environmentally sound siting decisions acceptable to all interested parties.

In 1987, EPA conducted a pilot effort using ADR to resolve conflicts between the Agency and citizens at three Superfund sites in Massachusetts, Ohio, and Washington. The project was initiated to explore the use of dispute resolution techniques to assist EPA in implementation of response actions at Superfund sites, and to involve communities in a communication process which would reduce tensions while addressing community and Agency concerns pertaining to proposed response actions. As an outcome of this experience, we believe that ADR can be useful when normal community relations activities have not or are not likely to be successful. The Agency will explore further use of ADR to aid citizen understanding of the Superfund process in specific communities.

INCORPORATION OF ADR INTO FEDERAL PRACTICE

In addition to the incorporation of ADR processes into the normal enforcement and regulatory activities of the Agency, EPA has taken a number of steps to foster the use of ADR within the federal government. The Agency has funded and is currently working with the Administrative Conference of the United States to develop a computerized roster of "neutrals" for all federal agencies. This roster, which will be administered by the Conference, will provide a mechanism for interested parties to obtain information on ADR professionals available for disputes involving federal agencies or statutes.

EPA is a member of the Conference's ADR Roundtable through which different agencies meet periodically to discuss developments in ADR, and how the use of ADR in federal practice might be fostered. The ADR efforts of other agencies in using ADR should be recognized. Specifically, the U.S. Army Corps of Engineers has used ADR extensively to resolve disputes with contractors on projects, and the Navy has made it a policy to presumptively use ADR in small contract disputes.

In closing, let me reemphasize that the Agency's experience with the use of ADR in our enforcement and regulatory programs has been very positive; we will continue to explore further appropriate uses and encourage the expansion of ADR by private firms in support of Agency activities. We greatly appreciate the efforts of the Subcommittee to foster the expanded use of ADR processes in federal agency practice. I would be pleased to answer any questions you may have at this time.

Department of Justice

STATEMENT OF WILLIAM P. BARR
ASSISTANT ATTORNEY GENERAL
OFFICE OF LEGAL COUNSEL

HEARING

BEFORE THE

SUBCOMMITTEE ON OVERSIGHT OF
GOVERNMENT MANAGEMENT

COMMITTEE ON GOVERNMENTAL AFFAIRS

UNITED STATES SENATE

REGARDING THE USE OF

ALTERNATIVE DISPUTE RESOLUTION

BY FEDERAL AGENCIES

SEPTEMBER 19, 1989

Thank you for the opportunity to present the views of the Department of Justice on S. 971, which would authorize agencies to use a number of alternative dispute resolution, or "ADR," techniques. The Department has encouraged, and continues to support, the use of ADR techniques in those cases where ADR can reduce the time and expense devoted to litigation. S. 971 is an ambitious attempt to promote ADR in administrative disputes. Although many of the ADR techniques covered by the bill may already be available to agencies, S. 971 would increase the use of ADR, by adding the authority of a specific Congressional enactment. Throughout the government, the bill would exert a gravitational pull toward use of ADR as a means of deciding disputes.

S. 971 would authorize and encourage agencies to explore a number of ADR techniques that we, like the sponsors of the bill, would like to see more frequently used -- conciliation, facilitation, mediation, factfinding, mini-trials, and settlement negotiations. See § 3(a)(2). All too often, the parties to a dispute expend their energies in litigating the case to a decision, when less formal processes would have produced a faster, less costly, and equally just outcome. However, as I will explain, we believe that the arbitration provisions of S.

971 involve practical problems, raise serious constitutional questions, and should be deleted.

Because we believe it essential to develop alternatives to the full-scale litigation of disputes involving the government, we have encouraged participation by our attorneys in a variety of other experimental ADR methods. Our efforts have included the issuance of a policy statement encouraging the use of mini-trials, actual participation in mini-trials, and support for judicially supervised alternative dispute resolution techniques. The Civil Division's Commercial Litigation Branch has cooperated with the United States Claims Court in the development of General Order No. 13, which establishes an alternative method of dispute resolution using a settlement judge. The Civil Division's Torts Branch participates in and is responsible for the administrative claims process developed under 28 U.S.C. § 2672 for Federal Tort Claims Act cases, and regulations issued by the Department of Justice for implementing that administrative process (28 C.F.R. Part 14) are applicable throughout the government. Through this process in 1988, 214 administrative tort claims for amounts exceeding $25,000 were resolved with Justice Department approval, and the total paid to resolve these claims was $34,282,097.

Of course, ADR is not the solution for every problem of delay and expense in litigation. Each ADR procedure itself has a cost, and the Department tries to reach balanced judgments about whether that cost is justified in specific cases. In making these judgments, the government is sometimes under constraints that would not apply to private litigants. For example, in resolving non-meritorious claims, private litigants might resort to ADR as an avenue toward a settlement that would avoid the expense of litigation. The government, however, may find ADR unhelpful in that situation, because the government lacks authority to pay money in settlement of non-meritorious claims. ADR thus may be wasteful in cases where principled disputes on legal issues make settlement unlikely. The government, as a frequent litigant, also resists frivolous claims, in order to discourage such claims in the future. Still, in many instances, ADR can save time and money in the resolution of disputes involving the government.

ARBITRATION -- PRACTICAL PROBLEMS

In addition to providing for the use of ADR techniques like conciliation and mediation, which we support, the bill would allow agencies and private parties, by mutual consent, to submit disputes to binding arbitration. Both sides would participate in the selection of the arbitrator. § 587(a). After hearing evidence, the arbitrator would issue a decision, setting out a "brief, informal discussion of the factual and legal basis" for the award. § 590(a). The award would then be "final and binding on the parties." § 590(b). Despite our general support for ADR, such binding arbitration, in our view, creates practical problems, as well as raising serious constitutional concerns.

The bill would set up a system of private, binding arbitration that would exist side-by-side with the present system for adjudication before administrative law judges. Like administrative law judges, arbitrators to be empowered under S. 971 would be "neutral[s]," with no personal stake in the controversies, § 587(b), and would regulate proceedings, administer oaths, take evidence, preside over cross-examination, and hand down decisions. § 589(c).

As a practical matter, we believe that arbitration is both less necessary and less attractive in the administrative context than in the context of disputes between private parties. Private parties in cases not involving the government agree to arbitration because they want a procedure more streamlined than the alternative -- litigation in a court. S. 971, however, would establish an alternative to administrative procedures that are already supposed to be streamlined and informal. There may be legitimate concern about the "judicialization" of these procedures -- about the complexity, delay, and expense of proceedings before administrative law judges. The way to deal with that problem, however, is to address it directly, by simplifying procedures and, where appropriate, changing the allocation of resources. Instead of addressing the problem directly, S. 971 would create a duplicative system of arbitral litigation that would lack the regularity of proceedings before administrative law judges. And because arbitral awards under S. 971 would not have a precedential or estoppel effect, § 590(c), litigation under this system would not lead to the development of legal principles that might guide and thus simplify future cases. Moreover, in providing an alternative to litigation before administrative law judges, binding arbitration under S. 971 could enable agencies to escape their responsibilities for the formulation and execution of policy and the interpretation of law.

In other respects, too, the analogy of arbitration between private parties is inapplicable to arbitration involving the government. Private parties may resort to arbitration because they want a decision-maker who is an expert in the area of law or business in which the dispute arises. But administrative law judges offer exactly such expertise, so that substituting an arbitrator will provide no advantage.

Furthermore, arbitrators have an unfortunate tendency to split the difference between the parties' positions. See Behre, Arbitration: A Permissible or Desirable Method for Resolving Disputes Involving Federal Acquisition and Assistance Contracts?, 16 Pub. Cont. L. J. 66, 72 (1986). Even if private parties do not like that practice, they often can tolerate it. As I have observed, however, the government is in a rather different position with regard to "split the difference" outcomes. Unless there is a legal basis for a claim, we do not consider ourselves free to pay the claim or any portion of it in order to avoid the expense of a full-blown evidentiary hearing. Because the government takes this view, a private party with a weak claim is likely to find great appeal in the prospect of arbitration. To the extent an arbitral decision may be less principled than the decision that an administrative law judge would issue, a litigant with a weak claim will prefer arbitration and may seek to put political pressure on the agency to arbitrate the dispute.[1]

It is not an adequate defense of binding arbitration under S. 971 to say that, under the bill, the government could refuse to arbitrate any case where there was a need for the procedural regularity and the precedential function of litigation before an administrative law judge or where the private party's position was especially weak. The existence of a procedure for binding arbitration would create pressure to use that procedure. In many cases, an agency might find it easier to ignore the need for regularity and precedent and simply turn to binding arbitration as a means for escaping responsibility. It would be unwise to open up that possibility through the permissive terms of S. 971.

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[1] S. 971 would require the arbitrator to give "a brief, informal discussion of the factual and legal basis" for an award, but he would not make formal findings of fact or conclusions of law or otherwise duplicate the more rigorous exposition that an administrative law judge would provide. § 590(a).

Given these practical problems, we should not rush to promote arbitration before determining whether the problems of delay and expense in the administrative process can be handled through reform of the procedures now used by admininistrative law judges. At present, the problems of delay and expense cannot definitively be traced to the absence of arbitration, rather than to a failure to deal directly with the "judicialization" of the existing administrative process. Furthermore, because the arbitral process itself can become quite formal and elaborate, the "problem" that S. 971 eliminates may not turn out to be the delay and expense that the bill is intended to reduce, but the accountability that administrative procedures should encourage. We should try well-directed reform of the present process before resorting to change on the broad scale that the arbitration provisions of S. 971 would involve. We therefore recommend that the arbitration provisions of S. 971 be eliminated and that changes to streamline the existing system before administrative law judges be explored.

ARBITRATION -- CONSTITUTIONAL PROBLEMS

S. 971 also raises a serious question as to constitutionality. Arbitrators with the powers conferred under S. 971 could be viewed as Officers of the United States, engaged in execution of the laws, but would not be appointed in the manner required by the Appointments Clause. Art. II, § 2, cl. 2. Nor would they be subject to supervision and removal by the President and his delegates, as required by the President's constitutional responsibility to see to the faithful execution of the laws. Art. II, § 3.

Before I go into the details of the constitutional discussion, let me set out the common sense of our position. The constitutional problem with the arbitration provisions of S. 971 parallels the practical problems I have been discussing. S. 971 would dilute accountability and disrupt the making of policy by responsible officials. When the President appoints and supervises executive officials as the Constitution provides, he can be held accountable for how the laws are carried out. In cases submitted to binding arbitration, S. 971 would remove the power to execute the laws from Cabinet officials and agency heads who are in turn responsible to the only figure in American government elected by all of the people, and would transfer that power to arbitrators accountable to no one. This transfer of the power to make decisions not only would blur responsibility but also would threaten the ability of the executive to set and carry out policy. While I want to spend some time today discussing the intricacies of the legal arguments, our concern is really that simple, and that fundamental. S. 971 thus raises a serious issue about conformity with the Constitution.

Under S. 971, agencies would be encouraged to use ADR for the entire range of administrative disputes in which they might become involved. The bill specifically mentions disputes arising in formal or informal adjudication, rulemaking, enforcement, issuance or revocation of permits, and litigation. § 3(a)(2). The bill appears to contemplate that binding arbitration would not be used for resolving disputes that raise issues of policy, require the formulation of precedent, endanger consistency in an area where consistency is important, significantly affect persons who are not parties to the proceeding, call for a public record, or entail a need for continuing jurisdiction by the agency. § 582(b). But S. 971 would not forbid arbitration in cases that involve any or all of these factors.[2]

Arbitrators acting under S. 971 could be said to be "perform[ing] . . . a significant governmental duty exercised pursuant to a public law," Buckley v. Valeo, 424 U.S. 1, 140-41 (1976), and thus to be "Officers" of the United States in constitutional terms. Id. at 141. They would be involved in "functions necessary to ensure compliance with . . . statute and rules -- informal procedures, administrative determinations and hearings, and civil suits." Id. at 137. The bill would require arbitrators to "interpret and apply relevant statutory and regulatory requirements, legal precedents, and policy directives," § 589(c)(5), and "[i]nterpreting a law enacted by Congress to implement the legislative mandate" is a function that "plainly entail[s] execution of the law in constitutional terms." Bowsher v. Synar, 478 U.S. 714, 733 (1986).

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[2] Furthermore, the bill may suggest that binding arbitration could not be used in a rulemaking, because arbitral awards are not to have any precedential value or be considered in any future proceeding, § 590(c), and rules are by definition orders of future effect, 5 U.S.C. § 551(4). Once again, however, the bill does not explicitly forbid the use of arbitration to resolve disputes about rulemaking.

The Appointments Clause, Art. II, § 2, cl. 2, directs how "Officers" of the United States are to be appointed. Principal Officers are to be appointed by the President, with the advice and consent of the Senate. Congress, however, may vest the appointment of inferior Officers in the heads of departments, courts of law, or the President alone.

S. 971 would raise a serious issue regarding the commands of the Appointments Clause, as discussed in Buckley.[3] Under S. 971, arbitrators would be authorized to exercise significant authority with respect to such agency functions as adjudication and licensing. These arbitrators, however, would not be appointed in accordance with the Appointments Clause, but rather would be chosen by the parties. §§ 583, 587.[4]

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[3] In his study The Constitutionality of Arbitration in Federal Programs (May 27, 1987), prepared for the Administrative Conference of the United States, Professor Harold H. Bruff argues that, in Buckley, the Court "was considering whether Congress could assume the President's appointments power, not whether it could authorize or require the delegation outside the government of some functions that could be performed by the executive. The problem of congressional aggrandizement disappears when Congress allocates the appointment power elsewhere." Id. at 19 (footnote omitted). Professor Bruff's argument assumes that the Appointments Clause rests only on concerns about separation of powers and has nothing to do with accountability in government. Although the Appointments Clause has a critical role in ensuring the separation of powers (see Buckley, 424 U.S. at 124-25), it also aims at accountable government: "The sole and undivided responsibility of one man will naturally beget a livelier sense of duty and a more exact regard to reputation." The Federalist No. 76 (Rossiter ed.) at 455 (discussing Appointments Clause).

In addition, S. 971 presents constitutional problems concerning the accountability of arbitrators to the President for their executive actions. As I have noted, S. 971 would authorize arbitrators to perform a broad range of executive functions, from making "determinations of eligibility for [federal] funds," Buckley, 424 U.S. at 140 (involved in making monetary awards enforceable in the courts), to granting licenses or resolving enforcement disputes. These functions involve "[i]nterpreting a law enacted by Congress to implement the legislative mandate," which "plainly entail[s] execution of the law in constitutional terms." Bowsher v. Synar, 478 U.S. 714, 732-33 (1986). It has generally been thought that the President must have the power to remove the officer performing such core executive duties, in order to ensure the officer's accountability to the President. See Bowsher, 478 U.S. at 721-27, 732-33; Myers v. United States, 272 U.S. 52, 161-164 (1926); cf. Morrison v. Olson, 108 S.Ct.

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[4] The appointment of "permanent or temporary government employee[s]," § 583(a), would raise no less serious a question about violation of the Appointments Clause. To the extent a mere "employee" is also granted executive power as an "Officer" of the United States independent of his other duties, see Buckley, 424 U.S. at 126 & n.162, the constitutional problem is identical to that involved in the appointment of private persons.

2597, 2616-2622 (1988). Even the head of a so-called "independent agency," performing "quasi-legislative" or "quasi-judicial" duties, is subject to removal by the President for inefficiency, neglect of duty, malfeasance, or other good cause. Mistretta v. United States, 109 S. Ct. 647, 673 (1989); Humphrey's Executor v. United States, 295 U.S. 602, 619 (1935); cf. Morrison, 108 S. Ct. at 2617, 2619.

Here, by contrast, arbitrators appointed under S. 971 would be subject neither to executive review nor to executive removal.[5] If the arbitrator exceeded the scope of his assigned duties or exercised them in an improper manner, the decision would still be binding against the executive branch.[6] There is serious doubt that S. 971 gives the Executive "sufficient control over the . . . [arbitrator] to ensure that the President is able to perform his constitutionally assigned duties" as Chief Executive to take care that the laws be faithfully executed. Morrison, 108 S.Ct. at 2622.

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[5] Although S. 971 implies that the United States could "terminate" an arbitration before completed, § 591(c), this authority would provide an avenue for effective review only before the arbitrator rendered his final decision.

[6] This should be contrasted with the remedies available for review of improper executive action by Independent Counsel, at issue in Morrison. If an Independent Counsel acts improperly, for example by engaging in "misconduct" or bringing a prosecution that is not justified under applicable Department of Justice policy guidelines, see Morrison, 108 S. Ct. at 2620-22, the Attorney General may remove him (subject to judicial review) before the consequences of the Independent Counsel's errant conduct have come to fruition. There would be no comparable ability to exercise any degree of control or supervision over the executive actions of arbitrators appointed under S. 971.

We note that the Administrative Conference of the United States ("ACUS") contends that, notwithstanding these constitutional difficulties, several statutes already provide for private persons to render binding arbitral awards on claims involving the government. Most of the statutes cited by the ACUS, however, do not unambiguously call for binding arbitration. The statute dealing with arbitration under the National Flood Insurance program, 42 U.S.C. § 4083, specifies that the arbitration is to be non-binding. Two provisions concerning admiralty claims do not state that the arbitration is to be binding, and they do not create a comprehensive framework that might indicate binding arbitration was contemplated. 46 U.S.C. §§ 749, 786.[7] The statute relating to investment guarantees under the foreign assistance program provides for arbitration "on such terms and conditions as the President may direct." 22 U.S.C. § 2395(i).[8] The Superfund Amendments allow for arbitration under regulations to be issued after consultation with the Attorney General but do not specify that the arbitration will be binding. 42 U.S.C. § 9622(h)(2). Thus, any regulations issued under the statute could be amended at any time to provide for the agency to have the ultimate power of decision.[9]

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[7] 46 U.S.C. § 748 refers to payment of "any arbitration award or settlement had and agreed to under . . . section 749," upon presentation of a duly authenticated copy. 46 U.S.C. § 787 refers to "[a]ny final judgment . . . [or] any settlement had and agreed to under . . . section 786," but does not mention arbitration awards. Neither section 748 nor section 787 is inconsistent with reading the arbitration provisions as limited to non-binding arbitration.

[8] The provision for private decision-makers to resolve disputes over Department of Education grant allowances has been repealed. 20 U.S.C. § 1234.

The statute that was at issue in Schweiker v. McClure, 456 U.S. 188 (1982), authorizes the Secretary of Health and Human Services to contract with private insurers to make decisions about claims against Medicare funds. See 42 U.S.C. § 1395u. But the Secretary could resume the power of decision at any time.[10]

In sum, the existing statutory provisions on arbitration, we believe, are weak authority for the wholesale authorization of binding arbitration that S. 971 would create, even assuming that the existing statutes could cast some light on the constitutional issues. But see INS v. Chadha, 462 U.S. 919 (1983)(overturning legislative veto, despite numerous statutes with such provisions).

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[9] Under current litigation practice, the Department of Justice does not participate in arbitration proceedings in which an award could be enforced directly against the government, without subsequent de novo judicial or administrative examination.

[10] With respect to arbitration of federal labor disputes, we would certainly oppose any reading of S. 971 under which the bill expanded the category of arbitrable issues in that field.

The ACUS also mentions provisions of the U.S.-Canada Free Trade Agreement that transferred review functions from the Court of International Trade to a binational panel of private decision-makers. The constitutional questions about those provisions were such that when Congress passed implementing legislation, it included a back-up provision that would apply if the panel were declared unconstitutional. Pub. L. No. 100-449, § 401(c), 102 Stat. 1851, 1882 (1988).

It would be possible to resolve these constitutional difficulties (although the practical problems I have discussed would remain). The arbitrator could be selected (and could be removed) by the head of the agency, with the arbitral decision not to become final until reviewed and approved by the head of the agency, who is accountable to the President. This form of arbitration would avoid the constitutional issues that S. 971 presents. Arbitrators would be inferior officers, appointed by the heads of the agencies and accountable to them, and their decisions would be subject to executive review. Under this arrangement, if the private party disapproved of the arbitrator selected by the agency, he could be allowed to withdraw his consent to arbitration.

While this method of structuring arbitration would be constitutional, it would not obviate the practical concerns we expressed about arbitration in the administrative context. Therefore, the option that we would commend to the committee would be to drop arbitration altogether and instead encourage the use of simpler procedures within the current system of administrative adjudication.[11] By such encouragement, we can learn whether delay and expense can be reduced without a sacrifice of accountability. We can find out whether the "judicialization" of the administrative process can be reversed, where appropriate, by direct measures, before assuming that these measures will fail and that only a duplicative system of administrative arbitration can offer a solution. If this encouragement of change in the existing system does not succeed in producing a streamlined process, arbitration can be considered in the future.

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[11] The bill could provide: "In any hearing before an administrative law judge, the parties may agree to simplified procedures, notwithstanding any regulation to the contrary."

APPENDIX -- OTHER PROBLEMS OF POLICY AND DRAFTING

S. 971 also raises a number of other problems of policy and drafting.

Confidentiality is essential to the effective use of ADR techniques. Section 590(c) might not adequately protect the confidentiality of arbitral proceedings, because it would not expressly forbid the introduction of evidence about an arbitration at a later proceeding involving the same parties. For example, Section 590(c) would not expressly prohibit evidence about the arbitral proceeding at a trial de novo after an award has been rejected or vacated. The section should be revised to forbid any use of evidence about the ADR proceeding in a later action on the dispute submitted to the ADR procedure. Similarly, Section 584(h) would allow information introduced in an ADR proceeding to be used in a later action against the neutral (even though it could not be used in a later action on the issue in the ADR proceeding). Without further restriction, the entire record of the action against the neutral, including information submitted by the parties in the ADR proceeding, could become public. Section 584(h) thus should be revised to provide for procedures (such as sealing records or issuing protective orders) that will guard against any disclosures that are not absolutely necessary.

Section 3(d) would require each federal agency to review and amend each standard contract, grant, and other assistance agreement to authorize and encourage the use of ADR. We read that section as applying prospectively. If the section were intended to require review and revision of existing contracts, grants, and assistance agreements, it would impose a severe burden on the affected agencies (assuming it would be lawful to revise all of the existing contracts in the first place). The meaning of the section should be clarified. Furthermore, there may be contracts, grants, or agreements that are likely to generate disputes not amenable to resolution through ADR techniques. Thus, it would be preferable not to require insertion of the ADR provision.

Section 5 of S. 971 would amend the Contract Disputes Act ("CDA"). Section 5(a) would require each contracting officer to "make all reasonable efforts to resolve a claim or dispute consensually." Under this provision, the contracting officer's efforts to resolve claims or disputes consensually might themselves become subjects of controversy. Moreover, it has been the Department's experience that disputants use voluntary ADR programs more successfully than mandatory programs. Therefore, we recommend that the proposed amendment to the CDA encourage, but not require, the use of ADR techniques.

If ADR were used in a contract dispute, there would still be a need to ensure the integrity of the dispute resolution process. We therefore recommend that the following sentence be added to Section 5(b) of the bill (proposed Section 7(b) of the CDA), after the term "$250,000": "In such instances, the contractor shall certify that the claim is made in good faith, that the supporting data are accurate and complete to the best of his knowledge and belief, and that the amount requested accurately reflects the contract adjustment for which the contractor believes the government is liable."

Section 5(d) might be read as amending the CDA (41 U.S.C. § 607(g)) to provide for district court review when the contracting officer agrees to arbitration and an arbitral award is issued. That alteration of the CDA would not be desirable. Under the CDA, a contractor has two choices for obtaining review of a contracting officer's decision. The contractor may proceed directly to the Claims Court, 41 U.S.C. § 609, or may appeal to a board of contract appeals. 41 U.S.C. § 606. In either case, the next appeal is to the Federal Circuit. 41 U.S.C. § 607(g)(1); 28 U.S.C. § 1295(a)(3). There is no reason to provide for review in district court when the contracting officer agrees to arbitration, especially since the ordinary CDA review procedures apparently are to be followed if the contracting officer agrees to a form of ADR other than arbitration. Section 5(d) should be revised to make clear that the district courts would not obtain new powers to review CDA cases.

Finally, some ADR procedures may be inappropriate in cases affecting public health or the environment, but S. 971 as drafted may not sufficiently recognize this limitation. Therefore, we recommend that Section 582(b) be revised to include: "(7) the matter may affect human health or the environment." Section 584(a)(4)(C) should be amended to read: "protect the public health or safety or the environment."

STATEMENT OF LLEWELLYN M. FISCHER
GENERAL COUNSEL
U.S. MERIT SYSTEMS PROTECTION BOARD
ON S. 971
THE ADMINISTRATIVE DISPUTE RESOLUTION ACT
BEFORE THE
SUBCOMMITTEE ON OVERSIGHT OF GOVERNMENT MANAGEMENT,
COMMITTEE ON GOVERNMENTAL AFFAIRS
UNITED STATES SENATE
SEPTEMBER 19, 1989

Mr. Chairman and Members of the Subcommittee:

I am pleased to appear on behalf of the Merit Systems Protection Board. The Board has made extensive use of alternative dispute resolution procedures in its adjudication of cases over the last five years. During this period, the Board has found ADR procedures to be extremely effective in achieving faster processing of cases and just results for the parties. The Board's settlement rates are quite dramatic. Between 1984 and 1988, the settlement rate of cases not dismissed has climbed from 6 percent to 48 percent, an eightfold increase. The following remarks are directed toward the Board's experiences with ADR procedures.

A few points should be noted at the outset about the Board's ADR program. First, the Board's primary use of ADR procedures has been in the context of administrative adjudication of employee appeals challenging agency personnel actions.

Second, the Board has a statutory basis for its use of ADR techniques. Section 7701(h) of Title 5 expressly authorizes the Board to implement alternative methods for settling cases.

Third, the Board's ADR program is flexible. In implementing its ADR program, the Board recognized that a variety of ADR techniques are professionally accepted. Accordingly, other than a requirement that a prehearing conference be held, the Board has not mandated any single or formal procedure for dispute resolution. Rather, it leaves to the discretion of its administrative judges--who sit as presiding officials in Board appeals--the ADR techniques to be applied in any particular case.

Fourth, the Board has provided for thorough and ongoing training of the administrative judges in ADR methods. In handling cases, the Board's administrative judges employ a variety of ADR techniques--including identification of issues, mediation, factfinding, stipulations, settlement negotiations, conciliation, facilitation, and, on occasion, mini-trials. The Board has found that the administrative judges' familiarity with, and facility and skill in using, a number of ADR techniques has been a key factor in the success of its program.

The Board's reliance on ADR procedures has generally resulted in faster, less expensive case processing. Our records show that for fiscal year 1988, the average processing time for settled cases was 65 days, compared to 99 days for cases adjudicated on the merits. Leaving aside any savings to parties, the Board estimates that during fiscal years 1987 through June 30, 1989, the settlement of cases saved the Board approximately $3,000,000. In addition to the savings in time and money achieved by consensual resolution of disputes, we believe that the parties and public also benefit because avoidance of what is often acrimonious litigation may well minimize the dislocation of the relationship between the agency and its employees.

Now, let me explain briefly how the Board's ADR program fits into the Board's adjudicative process. After an appeal has been filed, the regional office issues an order acknowledging receipt of the appeal and raising any questions of timeliness or jurisdiction. The agency is required to file a response and to provide the agency file to the appellant and the administrative judge assigned to the case. The appellant and the agency then have an opportunity to present additional information for the administrative judge's consideration. The administrative judge may initiate attempts to settle an appeal informally at any time. Presiding officials have all powers necessary to conduct fair and impartial hearings and to avoid delay in the disposition of all proceedings.

Under the Board's ADR procedures, absent some unusual circumstance, at least one prehearing conference for settlement and simplification of issues is required in every timely-filed case falling within the Board's jurisdiction. The parties may agree to waive the prohibitions against _ex parte_ communications during settlement discussions. The Board requires that a representative of a party at a prehearing conference have authority to settle the case--or have immediate access to someone with that authority. Other than the required prehearing conference, the ADR mechanisms used in any particular case are left to the discretion of the administrative judge.

If the parties agree to settle their dispute, the settlement agreement is the final and binding resolution of the appeal, and the presiding official will dismiss the appeal with prejudice. If the agreement is made a part of the record, the Board will retain jurisdiction to ensure compliance with the agreement. If the agreement is not entered into the record, however, the Board will not retain jurisdiction to ensure compliance.

There have been some new issues before the Board as a result of its increased reliance on ADR procedures. For example, a petition for enforcement of a settlement agreement may raise questions relating to construction of the terms of the agreement and issues relating to the burden of proof. Some settlement agreements have also brought about new issues in attorney fee cases--for example, questions relating to identification of the prevailing party.

There have been remarkably few problems in the Board's ADR program. Some petitions for review have been filed in cases where the initial appeal was settled. Such cases include allegations that the settlement process was unfair, that there were mutual mistakes, or that there was coercion by agency or Board officials. On review by the Board, almost all of these allegations have been found unsupported. Moreover, no court has found that settlement practices engaged in by the Board's judges coerced the parties or were otherwise improper with respect to the rights of the parties.

With respect to the proposed legislation, the Board will limit its comments to those areas in which it has had some experience. As an initial matter, the Board fully endorses ADR procedures as constructive alternatives to litigation. The procedures that I described earlier for adjudicating appeals demonstrate that commitment to ADR techniques.

Second, in authorizing agencies to use ADR techniques, the bill goes a long way in ensuring the effective use of ADR methods. The Board attributes its success in its use of ADR techniques in part to the statutory basis for its program.

Third, in the Board's view, the requirement in the bill that agencies provide training in ADR techniques is critical to the bill. The Board has found that training of its administrative judges on an ongoing basis was a key factor in the success of its program.

Fourth, the Board's experience has been that the efficacy of its ADR program rested in large part on the flexibility built into its system. The proposed bill appears to permit that same kind of flexibility.

Finally, the bill provides for the participation of neutrals in dispute resolution proceedings. The Board has not required that a separate settlement judge be appointed in every case. Rather, the Board allows either party to request appointment of a separate settlement judge. Such requests have been made infrequently. In our experience, a separate settlement judge has not been necessary to effect fair settlements, and, the Board's settlement practices have not been found coercive or otherwise improper.

Thank you, Mr. Chairman. I would be pleased to answer any questions you or the other members of the Subcommittee may have.

The Conservation Foundation

STATEMENT OF
GAIL BINGHAM, VICE PRESIDENT
THE CONSERVATION FOUNDATION
WASHINGTON, D.C.

Before the
Subcommittee on Oversight of Government Management,
Committee on Governmental Affairs,
United States Senate

"Hearing on S.971, the Administrative Dispute Resolution Act"

September 19, 1989

Mr. Chairman and Members of the Subcommittee:

I am Gail Bingham, Vice President for The Conservation Foundation, a non-profit environmental policy research organization. I am the Director of The Conservation Foundation's Program on Environmental Dispute Resolution and have been a professional mediator for over 10 years.

Let me begin by expressing my appreciation to the subcommittee for the opportunity to talk with you this morning about our experience with alternative dispute resolution approaches and to offer comments about Senate Bill 971, the "Administrative Dispute Resolution Act."

In addition to my experience as Director of The Conservation Foundation's Program on Environmental Dispute Resolution, I recently completed a three-year term on the National Board of Directors of the Society of Professionals in Dispute Resolution and a six-year term on the Board of its Washington, D.C. chapter, with one year as President. I currently serve on the Society's National Commission on Qualifications and on various committees.

Overview of Remarks

The Conservation Foundation wishes to express its general support for S.971 and, in particular, for: 1) the authorization and encouragement of federal agencies to use alternative dispute resolution procedures; 2) the recommended clarification of administrative procedures including the confidentiality provisions; 3) an expanded role for the Administrative Conference of the United States, along with neutrals in the public and private sector, to encourage other agencies in the appropriate use of alternative dispute resolution methods; and 4) funding of participation.

Alternative means of dispute resolution is simply good common sense. S.971 provides an important endorsement of these procedures as part of sound Administrative process, while still providing the clarification and constraints that are necessary for such processes to be used appropriately.

Although many federal agencies are taking increasing advantage of alternative dispute resolution methods in a wide variety of administrative disputes, other agencies remain cautious about their ability to utilize such processes to any significant degree. In many ways, the federal government is lagging behind the private sector in making use of alternative means of dispute resolution. Thus, the leadership of the Congress in speaking authoritatively on the public benefits to be gained from adding these tools to administrative processes will make a substantial difference in the willingness of agencies to use alternative dispute resolution methods.

I would like to speak particularly to the need for alternative dispute resolution processes in administrative decisions affecting environmental and other public policy issues.

Rationale for Alternative Dispute Resolution Methods in Administrative Decision Making

Over the past two decades, private businesses, citizen organizations, and local, state and federal governments have found themselves increasingly engaged in conflict over decisions that affect environmental quality, natural resources, the economy and numerous other issues of public policy. Many of these conflicts arise in the context of administrative decision making. Individuals and groups, having competing private interests or different perspectives about what constitutes the public interest, may disagree about such basic issues as the appropriate allocation of public and private resources for environmental protection and other social benefits, their attitudes toward risk, or the appropriate purposes for which to manage public lands.

These conflicts emerge as specific disputes when planning, permitting or enforcement decisions are to be made by government agencies -- for example, whether and under what conditions a hazardous waste facility will be sited, how to allocate the costs for cleaning up Superfund sites, what the land use requirements will be for the watershed of an estuarine sanctuary, what mitigation measures will be taken to reduce the impacts of a large public works project, how increased demand for water will be met in water-short basins, how many board-feet of timber will be harvested on a national forest, whether and how to preserve an historic building from demolition, etc. Disputes also arise over promulgating the regulations that govern such decisions.

The complexity of the disputes that arise in decisions affecting environmental quality and natural resources frequently compels a search for dispute settlement methods that are less costly and protracted - and more effective in reaching a lasting settlement of the issues involved - than are public hearings or litigation.

As indicated in the findings of Senate Bill 971, alternative dispute resolution methods such as settlement negotiations, conciliation, facilitation, mediation, factfinding, minitrials, and arbitration have been used in the private sector for many years and are now being used with great benefit in a variety of administrative decisions.

In 1973, Daniel J. Evans, then governor of the state of Washington, invited mediators Gerald W. Cormick and Jane McCarthy to convene a negotiation over a long-standing dispute over a proposed flood control dam on the Snoqualmie River and, in so doing, launched the rapidly growing practice of applying alternative dispute resolution processes to policy disputes.

The use of alternative dispute resolution methods in administrative decisions has grown rapidly. By mid-1984, mediators had been employed in a total of over 160 environmental disputes, and, although no accurate statistics are available, I would speculate that the number has at least doubled since then. There are now organizations and individuals in perhaps 25 states, the District of Columbia and Canada offering environmental dispute resolution services, with mediators and arbitrators in all 50 states involved in the broader range of administrative decisions.

The record of success in helping parties reach agreement through mediated negotiations is very promising. In a 1986 book I authored, entitled Resolving Environmental Disputes: A Decade of Experience, I found that the parties reached agreement in over 78 percent of the environmental mediation cases documented.

Numerous benefits of alternative dispute resolution processes are cited, particularly achieving more timely and more cost-effective decisionmaking by the avoidance of protracted litigation. For example, a regulatory agency such as EPA may find that as many as

80 percent of its regulations are litigated. If a negotiated agreement could be reached during the development of the draft rule, the overall savings to the government could be considerable. These benefits are realized in many cases, although a more systematic assessment of these benefits is needed. However, a more fundamental benefit, at least of mediated negotiations, is that the objective of a mutually agreed upon decision in these processes makes them more likely to produce a policy outcome that satisfies the interests of the parties involved. No one should be under any illusion that negotiations are necessarily inexpensive -- it takes a considerable investment of time and resources by all parties involved -- but the benefits of a better decision is of particular importance in public decision making.

It is important to note, however, that litigation, legislative action, and other forums for public decision making remain important tools for all parties. Alternative dispute resolution methods should remain a voluntary option.

Relatively recently, the mediation of controversial public decisions has grown beyond the resolution of disputes on a case-by-case basis to the institutionalization, by statute, of procedures for resolving such disputes. I was pleased to learn, Mr. Chairman, that your bill, the Negotiated Rulemaking Act of 1989, passed the Senate last month. I hope that it passes speedily in the House as well. Statutes in Wisconsin, Massachusetts, Rhode Island, Texas, Virginia and other states authorize or even require negotiation of disputes over the siting of solid or hazardous waste facilities, with provisions for mediation and arbitration as additional tools. A statute in Virginia specifies procedures for negotiation and mediation of intergovernmental disputes triggered by annexation proposals, and the Federal Insecticide, Fungicide and Rodenticide Act includes provisions for arbitration of certain disputes.

As I will describe below, the creation of a clear procedural framework, particularly by statute, can achieve two important objectives. First, it clarifies uncertainties and, thus, can increase the use of alternative dispute resolution processes. And, second, such procedural clarification, if done appropriately, can prevent the misuse of such processes.

The Conservation Foundation's Program on Environmental Dispute Resolution

The Conservation Foundation, a not-for-profit organization under 501(c)(3) of the Internal Revenue Code, has been a leader since the mid-1970s in evaluating and promoting, where appropriate, the development and use of negotiation, mediation and other alternative dispute resolution approaches in public decision making.

The Conservation Foundation, established in 1948, entered the field of environmental dispute resolution because of its unique history and competence in dealing with complex, environmental issues in a reasoned and balanced way; because of the credibility the Foundation enjoys with a wide spectrum of opinion leaders and because of the experience, skills, and reputation it developed through policy negotiations it conducted in the 1970's under its Business and Environment Program. The Foundation's activities in this area grew considerably after its merger in 1981 with RESOLVE, a non-profit environmental dispute resolution organization. CF's Program on Environmental Dispute Resolution is recognized as one of the premier dispute resolution organizations in the United States, serving as a leader in the effort to systematically improve the ways that public institutions resolve environmental and public policy conflicts.

Through its Program on Environmental Dispute Resolution, The Conservation Foundation:

1) provides mediation services for a wide variety of environmental policy decisions, including federal and state negotiated rule making efforts and policy dialogues, cost-recovery cases under Superfund, and U.S. Forest Service plan appeal cases, among others;

2) conducts research about the effective use of negotiation and mediation in public decision making; and

3) provides technical assistance and educational programs to share information about what we and others have learned in this field.

These three program components were developed to meet the program's goal of increasing the effectiveness of negotiated processes.

The Program seeks to address two problems. First, negotiation is under-used in the resolution of controversial environmental issues. Parties to environmental conflicts often do not take advantage of opportunities to exchange information and communicate their concerns with other parties in ways that might lead to mutually satisfactory outcomes.

Second, when parties to conflicts do negotiate, they are often not as effective as they could be in developing solutions that they think are better than would have been reached otherwise. Sometimes communications exclude important participants, discussions break down because impasses are reached, or the process includes insufficient information and analysis to generate creative options. The Program on Environmental Dispute Resolution attempts to solve this problem by providing participants in environmental conflicts with additional tools to enhance their negotiations, tools which can include conflict analysis skills, mediation services, guidance on obtaining adequate technical information to inform the negotiation, negotiation skills training, or facilitated workshops to allow better problem solving. Providing these services, researching their effectiveness, and communicating the results have constituted the mission of the Program on Environmental Dispute Resolution.

Mediation

Mediation is a process in which a neutral person(s) who is not a party to a dispute assists those who are parties to settle their differences through the use of negotiation. The outcome sought is usually an agreement among the participants. The Conservation Foundation's Program on Environmental Dispute Resolution employs several mediators who assist parties in public policy disputes to reach sound and broadly supported agreements. Most recently, mediations conducted by The Conservation Foundation have focused on the development of federal regulations, on policy dialogues among public and private parties at the national and state level, and on the resolution of certain specific conflicts involving land use, hazardous waste and other environmental issues.

Negotiated Rulemaking. This process brings interested parties together prior to a controversial regulatory decision to negotiate agreement on the text of a draft regulation before it is issued as a proposed rule. This process has been used at the federal level, and is increasingly being used at the state level.

The Program on Environmental Dispute Resolution has mediated negotiations for the Environmental Protection Agency on:

- rules concerning underground injection of hazardous wastes,

- revisions to waste facility permitting procedures under the Resource Conservation and Recovery Act, and

- procedures for investigating and remedying asbestos problems in the nations's public schools.

CF is or has mediated negotiated rulemaking efforts for other federal agencies, including:

- for the U.S. Forest Service, Foundation staff currently are assessing the feasibility of a negotiated rulemaking on forest plan implementation regulations.

- for the Nuclear Regulatory Commission, Foundation staff mediated a negotiation of rules for computer-assisted discovery and document management for the licensing hearings for the nation's first high-level nuclear waste repository.

- for the Federal Trade Commission, Foundation staff mediated a negotiation of rules governing consumer dispute resolution mechanisms created under Section 703 of the Magnuson-Moss Warranty Act.

In all negotiated rulemaking cases, Foundation staff help the sponsoring agency and others with an interest in the regulation assess the feasibility of using a negotiated process and agree on how to best structure the negotiation process to increase the likelihood of success. Foundation staff are conducting or have recently concluded assessments on five potential negotiated rulemaking cases, involving: revisions to EPA's spill control regulations for petroleum tanks, biotechnology issues, control of fugitive emissions of volatile chemicals in industrial machinery, forest plan implementation, and uranium mill tailings.

Policy Dialogues. Since the mid-1970's, The Conservation Foundation has facilitated policy dialogues on major national policy issues - to clarify the issues, narrow the scope of differences, develop new policy options, and reach consensus among leaders of groups who have a stake in a particular issue.

During the decade in which The Conservation Foundation has provided facilitation services, Foundation staff have convened and facilitated national policy dialogues on toxic substances control, low-level radioactive waste management, forest management issues, hazardous waste facility siting, energy pricing, export of U.S. produced pesticides to developing countries, clean-up of abandoned hazardous waste sites, national groundwater policy, solid waste issues under the 1984 amendments to the Resource Conservation and Recovery Act, testing for the effects of pesticides on birds, and national wetlands policy.

Among the Foundation's recent policy dialogue efforts are the following:

o At the request of EPA Administrator Lee Thomas, the Foundation convened the National Wetlands Policy Forum in 1987. The purpose of the Forum was to bring together parties with an interest in wetlands policy to develop sound, broadly supported recommendations to improve effective wetlands management. Governor Thomas Kean of New Jersey served as the Forum's chair. The Forum released over 100 consensus recommendations in November 1988. The Forum's report has literally become the agenda for debate about how to improve the management and protection of the nation's wetlands. Most notably, President Bush has adopted the recommended, interim goal of "no overall net loss" as the policy of this administration and has formed an interagency task force under the Council of Domestic Policy Advisors to implement this goal. The National Governors' Association also adopted a wetlands policy in February that closely reflects the Forum's recommendations.

o In early 1988, Foundation staff convened a dialogue among scientists and representatives of pesticide companies, environmental groups, and EPA to consider methods for improving the assessment of the effects of pesticides on bird populations. Agreement on recommendations concerning cooperative data gathering, research projects, and additional sources of data were reached in December 1988. The group will continue to meet to oversee implementation of its recommendations. The success of this dialogue has been the impetus for launching a similar dialogue on methods for testing the effects of pesticides on aquatic species.

o In mid-1988, Foundation staff were invited to facilitate negotiations among representatives of the U.S. Army Corps of Engineers, the Soil Conservation Service, U.S. Fish and Wildlife Service and the Environmental Protection Agency for the purpose of developing a single method for delineating wetlands for these agencies' field personnel. The agreement on the 145 page manual, replacing 10 years of interagency conflict over differing methods was released in January 1989.

o Most recently, Foundation staff have launched a new policy dialogue to explore opportunities to reduce the amount and toxicity of solid waste produced through industrial processes.

Site-specific. Foundation staff occasionally mediate site-specific disputes, principally when resolution of the dispute would have a larger impact either on national environmental policy or as a demonstration that might lead to more effective use of conflict resolution techniques. Current examples include:

- mediation of cost recovery cases under Superfund in Region V. This is a demonstration project intended to result in recommended procedures for other EPA regions wishing to utilize this approach.

- mediation of Forest Service Plan appeals in Wisconsin concerning the Nicolet and Chequamegaon National Forests.

- facilitation of meetings concerning a waterfront development plan in Solomons Island, Maryland.

Research

In May of 1986, the Foundation released Resolving Environmental Disputes: A Decade of Experience. This book was the first comprehensive, empirical study of environmental dispute resolution, and includes data on over 160 cases from the first ten-years during which mediation has been used to address environmental disputes. The research for this publication affirmed the effectiveness of environmental dispute resolution with the finding that agreements had been reached in more than three-quarters of the disputes in which mediation had been tried.

In another research effort, the Program on Environmental Dispute Resolution is documenting and evaluating the experience to date with the use of negotiation in solid and hazardous waste facility siting disputes. A principal emphasis of this project is the extent to which states have incorporated negotiation into formal siting procedures. The report's publication will be completed in 1989.

Other current research projects include:

- an assessment of effective cooperative planning strategies which EPA regions can undertake to improve wetlands management;
- an initial inquiry into the circumstances that might favor the use of negotiation in RCRA permitting decisions;
- a survey of the use of consensus-building processes by various program offices within EPA; and
- the development of a dispute resolution handbook for water resource managers which will examine the use of consensus-building efforts in water resources decision-making.

Communications and Technical Assistance

The Conservation Foundation systematically provides information about the entire field of environmental dispute resolution to a variety of audiences through conferences, the Resolve newsletter, training, and general outreach.

Conferences. The Foundation has provided a meeting ground and information source about environmental dispute resolution through four past national conferences. Previous conferences have attracted nation-wide attendees and participants, and have provided workshops for mediators and users of dispute resolution services throughout the country.

Resolve. The Conservation Foundation has published the Resolve newsletter, which has a circulation of approximately 6000, since 1981.

Training. Another important vehicle for outreach and communication is training. By providing training in negotiation and mediation to various organizations, The Conservation Foundation's Program on Environmental Dispute Resolution builds awareness and skills in those who participate in environmental policy decisions. These training programs can help build an improved institutional capacity to resolve environmental conflict. Recently, program staff have provided negotiation training to EPA personnel, to representatives of historic preservation and environmental groups, to participants in negotiated rulemaking efforts, to management trainees in the National Park Service, to Native American leaders, to citizen and government leaders in Canada, and to a wide variety of business, government and public interest group leaders.

General Outreach. Staff of the Program on Environmental Dispute Resolution provide information to interested parties about the use of mediation and referrals to practitioners throughout the country on a daily basis. Program staff speak regularly at numerous conferences and publish papers in a wide number of professional journals.

Comments on S.971 "Administrative Dispute Resolution Act"

The Conservation Foundation wishes to express its general support for S.971 and, in particular, for: 1) the authorization and encouragement of federal agencies to use alternative dispute resolution procedures; 2) the recommended clarification of administrative procedures including the confidentiality provisions; 3) an expanded role for the Administrative Conference of the United States, along with neutrals in the public and private sector, to encourage other agencies in the appropriate use of alternative dispute resolution methods; and 4) funding of participation.

The Conservation Foundation does not have the expertise to review the arbitration provisions of this bill.

Promotion of Alternative Means of Dispute Resolution

Alternative means of dispute resolution is simply good common sense. S.971 provides an important endorsement of these procedures as part of sound Administrative process, while still providing the clarification and constraints that are necessary for such processes to be used appropriately.

Although many federal agencies are taking increasing advantage of alternative dispute resolution methods in a wide variety of administrative disputes, other agencies remain cautious about their ability to utilize such processes at all or to any significant degree. In many ways, the federal government is lagging behind the private sector in making use of alternative means of dispute resolution. Thus, the leadership of the Congress in speaking authoritatively on the public benefits to be gained from adding these tools to administrative processes will make a substantial difference in the willingness of agencies to use alternative dispute resolution methods.

Administrative Procedures

Commonly, one of the reasons that alternative dispute resolution methods are underutilized is that the parties to disputes, including agency staff, are unclear about certain basic parameters or assumptions that would set the framework for the process. In the absence of needed clarity, it is very difficult for parties to evaluate whether the process is more attractive than other options for deciding the issues, thus decreasing the likelihood that alternative dispute resolution methods will be selected.

The questions that need clarification are often relatively straightforward:

- When can a dispute resolution process be initiated and by whom?
- Who will participate in the process, or how will participation be decided?
- What will the scope of issues be, or how will the scope of issues be decided?
- Will the outcome be voluntary (as in negotiation or mediation), nonbinding (as in factfinding or minitrials), or binding (as in arbitration)?
- How long will the process take? Is there a deadline?
- Who has the authority to reach an agreement?
- What will the consequences of an agreement or decision be, if one is reached?
- What will be the consequences of lack of agreement?
- Will confidential communications be protected?
- How much will the process cost?

The answers to these questions need not be rigid or reduce the flexibility that is one of the benefits of alternative dispute resolution processes. However, the encouragement that S.971 gives agencies to promulgate policies that address the use of alternative dispute resolution processes could have the very beneficial effect of creating a clearer framework for alternative dispute resolution processes. The definitions in Section 4 are similarly beneficial.

Subsections 582(a) and (b) should be noted as particularly important in this regard. The consent of the parties is crucial as are the considerations contained in (b). Section 583 also contains an important provision requiring the consent of the parties to the selection of the neutral.

Finally, the provisions for confidentiality are a very important element of S.971. This section is consistent with current case law. The incorporation of these provisions into statute, with the limitations and procedures for exception provided, adds a very important protection to the parties, to the neutrals, and to the ultimate success of alternative dispute resolution processes. S.971 does an excellent job of capturing an appropriate balance in preserving the public interest both in encouraging the use of alternative dispute resolution processes and in preserving the needs for information and disclosure under other statutes.

Role of the Administrative Conference of the United States

The encouragement that S.971 provides for administrative use of alternative dispute resolution processes could substantially increase the need for neutral dispute resolution services by the federal government. The process of identifying and hiring public or privately employed neutrals would be improved by the creation and management of a roster of such neutrals by an administrative agency, with the proviso that federal agencies retain the option to contract for the services of neutrals, or for the development of a roster, directly with either public or private dispute resolution providers as is contemplated in S.971.

Several federal agencies, including the Federal Mediation and Conciliation Service and the Community Relations Service of the U.S. Department of Justice, employ neutral dispute resolution professionals. In addition, several thousand qualified neutrals practice in the private sector. Thus, to a considerable degree, the expertise and services needed by federal agencies, including the creation and management of rosters, is available from the private sector or directly from dispute resolution professionals employed by the federal government, which could certainly be augmented but should not be displaced by a federal roster.

It is our view that the Administrative Conference of the United States would be the most appropriate agency to develop and maintain the proposed roster. The Administrative Conference has devoted considerable study to this topic and has adopted a series of precedent-setting recommendations to encourage and guide the use of alternative dispute resolution processes in administrative processes. Authorizing the role and funds for The Administrative Conference to support the broader implementation of these recommendations, particularly in agencies that have little experience with alternative dispute resolution, is a generally positive step. Other technical assistance and data collection services contemplated in S.971 would be beneficial.

The Conservation Foundation currently maintains a roster of professional neutrals under a contract with the Environmental Protection Agency, and has done so under several different mechanisms for approximately three years. It is our experience that to perform this function adequately to meet the needs of the agencies and other parties to disputes requires staff with personal experience as neutral dispute resolvers and a substantial amount of time and resources. To do this job appropriately, therefore, the Administrative Conference should be given adequate resources.

Four key tasks are important to note specifically. First, as articulated in the Principles for Qualifications for Neutrals, promulgated by the Society of Professionals in Dispute Resolution and attached as part of this testimony, agencies managing rosters should formulate the criteria and qualifications for selection of neutrals in consultation with representatives of the parties who are likely to be involved in the cases and with neutral dispute resolvers.

My personal recommendation is that individual rosters be established for different categories of disputes or processes (e.g. arbitration of contract disputes, mediation of multi-party rulemaking negotiations, mediation of solid or hazardous waste enforcement cases, mediation of discrimination cases, etc.). The qualifications required vary significantly between processes such as mediation and arbitration, between the technical knowledge required, and between cases where the parties are few in number or very well organized to represent themselves and cases where the parties are numerous and diffuse.

Second, staff will need to spend a considerable amount of time collecting and processing the applications of neutrals to be included in the roster(s). One issue about which individuals in this field differ is the extent to which the agency managing the roster could or should be involved in deciding who is qualified to be listed and who is not. If federal agencies and the other parties to administrative disputes are to obtain the best services, then I believe strongly that time and expertise need to be given either to the selection process or to the collection of detailed information so that the parties can make an informed decision themselves. But in no case should this be seen as a simple or inexpensive task.

Third, in addition to general technical assistance and information services to other federal agencies, any public or private agency maintaining a roster will need to devote skilled personnel to respond to the requests for the services of neutrals received. Often the initial contacts from an agency interested in hiring a mediator or other neutral are made at an early stage in the planning process or, if later, are linked to a sufficiently polarized situation that the other parties to the dispute must be contacted to determine whether and under what circumstances they would be willing to consider an alternative dispute resolution process. It often takes a considerable amount of time to get from an initial request to an understanding of whether and what neutral services are really appropriate and what the relevant qualifications are.

Fourth, there are numerous administrative tasks involved simply in the contracting process that will require the time and attention of the agency administering the roster.

I make these points in part to point out the rationale for providing sufficient resources to the Administrative Conference.

Finally, I would encourage this committee to target or indicate in some fashion the proportion of the appropriation to the Administrative Conference intended for those costs associated with creating and maintaining a roster and other data collection or technical assistance services and those funds anticipated to be granted to participants in dispute resolution processes, who need reimbursement for expenses. As discussed below, public interest representation in dispute resolution proceedings often requires financial assistance. Thus, we recommend a clearer requirement about the establishment of a fund for this purpose (see below). In our view, the proportion allocated to such a fund should be greater than half of the total, but we would defer to the view of the Administrative Conference about the precise division between appropriations for administrative costs and for such a fund.

Funding of Participation

It is extremely important that any dispute resolution process involving policy decisions such as rulemaking, permitting, or planning include a balanced representation of all public and private interests affected by the proposed decision. Some enforcement cases may as well, while contracts disputes are unlikely to involve public interest organizations.

The costs of effective representation in some proceedings are considerable. Public interest groups, however, generally do not have the financial or personnel resources to bear these costs. Such costs include, but often go far beyond the expenses of travel and accommodations to attend meetings. Many regulations, permits or plans involve considerable technical complexity which all parties must analyze and, sometimes, rebut. Regardless of the technical complexity of the issue, however, for parties to negotiate effectively requires considerable time and resources in preparing proposals, formulating options, assembling arguments, and evaluating the proposals of others.

Thus, The Conservation Foundation recommends that the following sentence be added at the end of Subsection 595(b):

> "The Administrative Conference of the United States, in consultation with other federal agencies, practicing neutrals, and public interest organizations, shall create a fund to pay all or part of the expenses of persons determined to be eligible for assistance in accordance with this section."

Conclusion

Again, Mr. Chairman and Members of the Subcommittee, I would like to thank you very much for the opportunity to comment on this proposed legislation. S.971, if passed, would make a major contribution toward enabling the federal government to take greater advantage of the alternative dispute resolution processes being used effectively in the private sector.

I hope these comments have been helpful and that you will contact the Foundation if you have any questions.

SPIDR

SOCIETY OF PROFESSIONALS IN DISPUTE RESOLUTION

QUALIFYING NEUTRALS:
THE BASIC PRINCIPLES

APRIL 1989

REPORT OF THE SPIDR COMMISSION ON QUALIFICATIONS

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Adopted by the SPIDR Board of Directors
April 1989

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SOCIETY OF PROFESSIONALS IN DISPUTE RESOLUTION

QUALIFYING NEUTRALS: THE BASIC PRINCIPLES

April 1989

EXECUTIVE SUMMARY

The role of the SPIDR Commission on Qualifications is to examine the question of qualifications of mediators and arbitrators. Established by the Board of the Society of Professionals in Dispute Resolution, the Commission is composed of individuals representing a broad variety of backgrounds and experience. While the recommendations may have general applicability, the primary focus of the Commission's inquiry has been on those areas of alternative dispute resolution in which legislatures and other public bodies are now seeking to establish criteria that define who can serve as a mediator or arbitrator. The Commission's recommendations have been approved by the SPIDR Board.

The most commonly discussed purposes of setting criteria for individuals to practice as neutrals are: 1) to protect the consumer and 2) to protect the integrity of various dispute resolution processes. Concerns also have been raised, particularly about mandatory standards or certification, including: 1) creating inappropriate barriers to entry into the field, thus, 2) hampering the innovative quality of the profession, and 3) limiting the broad dissemination of peacemaking skills in society. Perhaps the most pragmatic reason for SPIDR to address the issue of qualifications is that minimum requirements for neutral practice already are being set by legislative, judicial, and administrative bodies. As a leading professional association of neutrals in all fields, SPIDR has a substantial degree of expertise on which these bodies can draw.

In determining how best to promote competence and quality in the practice of dispute resolution, the Commission considered several policy options. These included reliance on the free market, disclosure requirements, public and consumer education, "after the fact" controls such as malpractice actions, rosters, ethical codes, mandatory standards for neutrals and for programs, and improvements in training, including enhanced opportunities for apprenticeships.

The members of the Commission wish to thank the National Institute for Dispute Resolution for its generous support, which made the work of the Commission possible, and the many members of SPIDR and representatives of other organizations who contributed their ideas in writing, through discussions at chapter and other meetings, and through direct communication with Commission members.

After weighing these options, the Commission adopted three central principles, which recognize the need to strike an appropriate balance between competing concerns:

A. that no single entity (rather, a variety of organizations) should establish qualifications for neutrals;

B. that the greater the degree of choice the parties have over the dispute resolution process, program or neutral, the less mandatory the qualification requirements should be; and

C. that qualification criteria should be based on performance, rather than paper credentials.

No Single Entity.

This principle recognizes that the knowledge and techniques needed to practice competently may vary by context, process, issue, or institutional setting and that the establishment of uniform criteria for all neutrals could restrict the development of different approaches to dispute resolution and narrow entry into the field. Therefore, no single entity should be relied on to certify general dispute resolution competence. Moreover, entities seeking to establish criteria should be guided by groups that include representatives of consumers and experts in the field.

Degree of Choice.

This principle rests on the assumption that the need for protection against incompetence rises as the parties' ability to protect themselves by freely choosing or rejecting particular dispute resolution processes, programs or neutrals diminishes. As a consequence, SPIDR recommends:

1. When parties have free choice of the process, program and neutral, no standards or qualifications should be established that would prevent any person from providing dispute resolution services, as long as there is full disclosure of the neutral's relevant training and experience, the fees and expenses to be charged, and any financial or personal interest or prior relationship with the parties that might affect the neutral's impartiality.

2. Where public or private entities operate programs that offer no choice of process, program or neutral, an appropriate public entity should set standards or qualifications for such programs and for neutrals, in accordance with the principles set forth in this Report and make such standards and qualifications available to the parties.

3. When parties have some, but not a complete, choice of process, program or neutral, each program offering such services should establish clear selection and evaluation criteria and make such information available to the parties, together with its rules governing confidentiality, the means by which complaints may be lodged, and all relevant "full disclosure" information concerning the neutral selected for the particular case.

Performance-Based Qualifications.

The Commission has found no evidence that formal academic degrees, which obviously limit entry into the dispute resolution field, are necessary to competent performance as a neutral. There is impressive evidence that individuals lacking such credentials make excellent dispute resolvers and that well designed training programs, which stress the specific skills and techniques of mediation and arbitration, are of critical importance in attaining competence. As a consequence, SPIDR recommends:

1. Qualifications based on performance.

Academic degrees should not be a prerequisite for service as a neutral. Rather, qualification criteria, whether mandated by public bodies or adopted voluntarily by private agencies, should be based on performance, emphasizing the knowledge and particular skills necessary for competent practice.

2. Performance-based testing.

Policy makers should adopt mediation and arbitration performance criteria, such as those set forth in the body of this Report, and, to the maximum extent possible, incorporate performance-based testing into training and apprenticeship programs.

3. Qualifications for trainers.

To enhance the quality of training for neutrals, those offering such training should establish qualifications for their trainers, which emphasize knowledge of and competency to practice in the area for which the training is offered, the ability to teach others, and the ability to evaluate the performance of others in simulated settings.

4. Continuing education.

To ensure continued competency in this new and changing field, dispute resolution programs, entities that sponsor neutrals, and the neutrals themselves have a continuing obligation to maintain and improve acquired knowledge and skills through additional training, practice, and study.

IMPLEMENTATION

Although a good deal of work in this area remains to be done, much is now known. That knowledge and experience is more than sufficient for the Commission and SPIDR to recommend firmly that legislatures, judicial systems, administrative agencies and other public bodies use the principles of this Report to guide their development of qualifications and standards for neutrals. SPIDR similarly urges that public and private organizations employing or listing neutrals use the principles to guide and shape their policies and practice.

SPIDR also asks that other organizations, both public and private, join in a continuing national effort to: (1) implement these recommendations, while (2) fostering further development of practical performance-based criteria in different sectors and (3) ensuring adherence to agreed-upon standards through the design of appropriate enforcement mechanisms.

5

PRINCIPLES WITH DISCUSSION

I. INTRODUCTION

At the annual conference in New York in October 1987 of the Society of Professionals in Dispute Resolution, George Nicolau, then President of SPIDR, proposed the formation of a Commission on Qualifications. The SPIDR Board of Directors charged the Commission with examining the question of qualifications of neutrals (including mediators, arbitrators, and ombudspeople) and approved the following mission statement:

> The Commission's role is to examine the question of qualifications of [neutrals]. Established by the Board of the Society of Professionals in Dispute Resolution, the Commission is composed of individuals representing a broad variety of backgrounds and experience.
>
> In that examination, the Commission intends to solicit the broadest cross-section of views on this subject, including those of SPIDR's membership, other organizations involved with or interested in dispute resolution and the users of dispute resolution services.
>
> The Commission's recommendations will be subject to approval by the SPIDR Board. While the recommendations may have general applicability, the primary focus of the Commission's inquiry will be on those areas of alternative dispute resolution in which legislatures and other public bodies are now seeking to establish criteria that define who can serve as a mediator or arbitrator.

Linda R. Singer, Executive Director of the Center for Dispute Settlement in Washington, D.C., serves as Chair of the Commission. The members of the Commission are: Gail Bingham, Vice-President, Program on Environmental Dispute Resolution, The Conservation Foundation; Daniel P. Dozier III, Clean Sites, Inc., and former Legal Counsel, Federal Mediation and Conciliation Service; William Hartgering, Vice-President, Endispute Inc.; Patrick Phear, President, Family Mediation Associates; Frank E. A. Sander, Professor, Harvard Law School; Margaret L. Shaw, Director, Institute of Judicial Administration, Inc.; Lamont E. Stallworth, Labor Arbitrator and Professor, Institute of Industrial Relations, Loyola University of Chicago; and Paul Wahrhaftig, President, Conflict Resolution Center, Inc. Michael K. Lewis, Senior Advisor to the National Institute for Dispute Resolution, and George Nicolau, former President of SPIDR, serve as *ex officio* members of the Commission.

This report summarizes information about current public policy developments shaping the dispute resolution field and presents a set of principles that SPIDR recommends for the consideration of policy makers as guidance in making their decisions.

II. RATIONALE

The most commonly discussed purposes of setting criteria for individuals to practice as neutrals are: 1) to protect the consumer and 2) to protect the integrity of various dispute resolution processes. Many policy makers and professionals in the field are concerned about individuals with little information about or skill in dispute resolution simply "hanging out a shingle" and offering to mediate or arbitrate anyone's dispute. Further, concerns are being raised about poorly trained and inexperienced neutrals offering training to others. The risks are several -- the interests of parties may be harmed by incompetent practice and the public's understanding of what it means to request specific dispute resolution services may become confused, leading to public dissatisfaction with the field and claims that mediation and arbitration are merely a form of second class justice.

Proposals to establish qualifications for neutrals also raise considerable controversy, however. Some of the reaction appears to be anxiety among members of a profession newly faced with regulation. Many substantive concerns also have been raised, particularly about mandatory standards or certification, including: 1) creating inappropriate barriers to entry into the field, thus, 2) hampering the innovative quality of the profession, and 3) limiting the broad dissemination of peacemaking skills in society. Even many of those who are persuaded that there is a need for some mandatory standards are concerned that it may not be possible yet to define and measure competence.

Perhaps the most pragmatic reason for SPIDR to address the issue of qualifications is that minimum requirements for neutral practice already are being set by legislative, judicial, and administrative bodies.[1] As a leading professional association of neutrals in all fields, SPIDR has a substantial degree of expertise on which these bodies can draw.

Although current developments in legislating qualifications most frequently apply to disputes referred by courts, these developments are likely to shape the practice of dispute resolution in all sectors. With so many statutory or court-ordered requirements in place, avoidance of the issue is no longer an option. Rather, the question is what are the most appropriate and useful ways to achieve the objectives of policy makers who are concerned about ensuring qualified practice, without the negative consequences of limiting the field.

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[1] As of the end of 1988, at least 35 states and the District of Columbia had adopted some type of statutory authority for mediation. At least nine states had adopted comprehensive statutes to define and to encourage the development of "alternative" dispute resolution methods. At least 21 states provide for mediation of labor disputes, usually by state boards of mediation. At least ten states have statutes specifically addressing mediation of family disputes, including issues of divorce, separation, child custody, and visitation rights. Individual states authorize or require the use of mediation in other specific types of dispute -- for example, foreclosure by lenders against farm property and the siting of hazardous waste facilities.

Among the states that have legislated, by statute or court rule, qualifications for practice as a neutral are California, Florida, Iowa, Michigan, Minnesota, New York, Oklahoma, Texas, Virginia, and Wisconsin.

III. POLICY OPTIONS

There is no single way to promote quality in any professional practice. Among the options are:

A. free market

B. disclosure requirements

C. public/consumer education

D. "after the fact" controls, such as malpractice lawsuits

E. rosters

F. voluntary standards

G. codes of professional ethics

H. mandatory standards for neutrals

I. mandatory standards for programs

J. improvements in training for neutrals, including apprenticeship programs

A. Free market.

Classically, in the "free market" consumers of a service select any provider they wish, with no regulation of consumer or provider. This situation can be found in much labor arbitration practice and in the mediation of some family, commercial, and environmental disputes. Based on this experience, some assert that the free market is sufficient to ensure quality of practice because the parties will continue to select only those who have provided competent service.

B. Disclosure requirements.

A concern raised about the "free market" approach is that many parties, particularly those who do not use dispute resolution services on a regular basis, do not have access to complete information about practicing neutrals. Thus, these parties cannot make the *informed* choice on which the advantages of the free market depend. Consequently, some suggest that disclosure requirements would make a significant contribution to consumer protection. Decisions about what information should be disclosed, however, unavoidably depend on one's views about what attributes are relevant to competent practice.

An example of mandatory disclosure is Minnesota's Civil Mediation Act, which provides that any person performing mediation services pursuant to the act must provide potential parties with a written statement of qualifications, education, and training before commencing mediation. Failure to do so is a petty misdemeanor.

C. Public/consumer education.

Reliance on informed choice also assumes that parties will consider what characteristics of a neutral will serve their best interests. Although some parties are experienced in how dispute resolution processes and neutrals function, others are not. Some public and private agencies consider it their responsibility to conduct educational programs for potential parties or to raise questions to help them think through the implications of a variety of options. For example, the Massachusetts Council on Family Mediation provides potential clients with a list of useful questions and a range of possible answers.

D. "After the fact" controls, e.g. malpractice lawsuits.

The threat of malpractice lawsuits is one method of increasing the likelihood that individuals in any profession will practice in a competent manner. Few malpractice cases have been filed against neutrals to date and few professional standards exist against which to judge whether a particular individual has been guilty of malpractice in a given situation. The increasing tendency to formulate standards of practice may have growing implications for malpractice actions.

The collection of information about consumer dissatisfaction (such as the system used by Better Business Bureaus) also may provide incentives that promote quality.

E. Rosters.

An increasingly common means for encouraging the use of dispute resolution services is to establish "rosters" through which parties can obtain the services of a neutral. A roster differs from a dispute resolution program in that the neutrals listed on a roster provide services independently of the organization maintaining the roster. Although organizations that compile rosters vary in the amount of screening that they do, most stand behind the competence of the individuals included on their rosters. Examples of rosters are the lists maintained by the Federal Mediation and Conciliation Service and the American Arbitration Association.

Typically, the parties are given some choice in the selection of names from a roster. The initial choice to use a roster to obtain a neutral also is usually voluntary.

Some suggest that a roster approach can make it easier for parties to find qualified neutrals by drawing on the expertise of the organization that compiled the roster.

Whether consciously or not, organizations putting together rosters use a set of criteria to screen who is qualified, because someone must decide (and therefore limit) who gets on the roster in the first place. Obviously, some rosters apply less restrictive criteria than others; but usually the less restrictive the roster the longer the list; and the longer the list the more likely that the effective screening in any particular case will be done by an administrator who selects from the roster a panel of names from which the parties actually choose. An exception is that the FMCS asks the parties in each case for *their* screening choices from a set of standard criteria, then uses a computerized system with a random number generator to select the panel of names from those who meet the parties' criteria.

F. Voluntary standards.

Various professional organizations, such as the National Academy of Arbitrators, have adopted their own form of standards through their membership criteria. Another example is the Academy of Family Mediators, which has established detailed membership requirements and criteria to accredit mediators and trainers. Neutrals participate in these organizations voluntarily; if they choose not to do so they are not barred from practice. If the standards of the organization are explicit, well publicized, and seen as desirable by consumers, however, the consumers' preference for neutrals possessing the "credential" of membership in that organization may serve to increase the use of neutrals with those qualifications.

G. Codes of professional ethics.

One form of voluntary standards is a code of ethics, such as the code developed by the Society of Professionals in Dispute Resolution. Parties have the opportunity to know more about, and possibly value the qualities of, neutrals subscribing to a code of ethics.

H. Mandatory standards for neutrals.

Some suggest that specific standards should be set for who should be allowed to practice as a neutral, in part because parties often do *not* have a free choice of the neutral providing a dispute resolution service. Among those who hold this view there are differences about what criteria are good measures of competent practice. The most common pattern to date is for states to require degrees earned in related professions, such as law, social work or counseling. The specific degrees required vary. Recent regulations promulgated by the Florida Supreme Court, for example, limit court-referred family mediators to those with one of the following credentials: a master's degree in social work, mental health, behavioral or social sciences; psychiatrists; attorneys; and certified public accountants.

Some states include training requirements; one incorporates experience. In some states, such as Florida, a minimum number of hours of court-approved dispute resolution training is combined with academic degree requirements. In other states, such as Texas, dispute resolution training is the only requirement, but the training program must be certified by the court. The Texas statute explicitly rules out occupational status or degrees as requirements. Oklahoma combines training requirements with observation by an experienced mediator, independent case experience, and continuing education.[2]

There are different ways of setting standards for neutrals. The least restrictive is some form of certification, which may be performed by a private organization or a public agency. Lack of certification does not bar an individual from practicing. Licensing is more restrictive, performed by a public agency as a condition of practice.

I. Mandatory standards for programs.

Arguably, many public and private dispute resolution programs have *de facto* standards of practice. Mediation agencies such as the Federal Mediation and Conciliation Service, state mediation agencies, court-run dispute resolution programs, and private arbitration programs such as the Better Business Bureau all set standards for people they hire or use as volunteers.

A few state statutes establish mandatory standards for programs. Under New York's Community Dispute Resolution Centers program, for example, a Chief Administrator of the Courts provides supervision of approved centers. To be eligible, a center must follow prescribed guidelines, which include providing services at nominal or no cost, not accepting specified criminal disputes for resolution, and providing mediators who have received at least 25 hours of training in conflict resolution techniques.

Some dispute resolution programs maintain a working relationship with a list of neutrals not in their direct employ. When parties come to such a program for dispute resolution services, the program provides the services through a neutral on its list. These services may be offered on either a paid or volunteer basis. These programs have either explicit or *de facto* standards for the neutrals with whom they work.

Some suggest that setting criteria for *programs* offering dispute resolution services, rather than criteria for individual neutrals, might be an effective way to ensure quality of dispute resolution services without limiting the entry of individual neutrals into the field. Rule 703 under the Magnusen Moss Consumer Product Warranty Act, for example, regulates the scope of issues that a program can decide, the timetable of decisions, the training of neutrals, funding of services, and recordkeeping.

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[2] A statutorily authorized scheme recently adopted in New South Wales relies on a similar competence-based scheme for certifying mediators and programs. (Community Justice Centres Act, 1983, No. 127, assented to 20th September 1983, New South Wales Legislative Council and Legislative Assembly.)

J. Improvements in training for neutrals.

Regardless of whether any limitations on entry are established, a strong case can be made for requiring continuing training and evaluation of dispute resolution skills. One good way of achieving that objective is to apprentice new practitioners to more experienced ones. Both court-based and community mediation services use such schemes routinely.

IV. PRINCIPLES

There is no single answer to what constitutes a qualified neutral or which of the policy options described is appropriate to ensure that those who practice are qualified to do so. SPIDR recommends the following central principles:

A. **that no single entity (rather, a variety of organizations) should establish qualifications for neutrals;**

B. **that the greater the degree of choice the parties have over the dispute resolution process, program or neutral, the less mandatory should be the qualification requirements; and**

C. **that qualification criteria should be based on performance, rather than paper credentials.**

A. No single entity.

1-2. Clearly, the dispute resolution field is a diverse one. Even though there are some skills that are basic, the knowledge and techniques required to practice competently may vary by context, by process, by issue, or by institutional setting. Different criteria also may be relevant to binding arbitration, non-binding arbitration, mediation (where neutrals do not give opinions), and ombudsmanry.

Skills may need to differ in situations with differing dynamics. Some disputes are between individuals; others are between organizations; still others are within an institution or agency. Some disputes involve two parties; others involve many. Some disputes may be more polarized than others; in some cases there may be the threat of violence. In some disputes the parties have never met before and are not likely to meet again; in others the parties have an ongoing relationship. Some disputes involve parties who are knowledgeable, experienced negotiators; others do not; still others involve amateurs negotiating with professional advocates. Some disputes are private matters; others must be resolved in the limelight of politics or litigation.

It may be important to avoid policies that would allow any one public or private body to establish uniform criteria for all neutrals, even for a single sector. Such uniformity could restrict the development of different dispute resolution approaches and, if misused, could close the ranks of the profession to particular social or ethnic groups.

Thus, SPIDR recommends:

P1. Where criteria for determining minimum competence in different contexts are warranted, they should be established by a variety of agencies working in those contexts. No single entity should be relied on to certify general dispute resolution competence.

P2. Public and private entities making judgments about appropriate qualifications should be guided by groups that include representatives of consumers of the services and individuals with expertise in alternative dispute resolution processes, as well as representatives of the sponsoring body.

B. Degree of choice.

3. In some cases parties voluntarily agree on a dispute resolution process and a mutually acceptable neutral. Although SPIDR encourages public and private dispute resolution programs to provide parties with the greatest possible choice of both process and neutral, the actual degree of choice afforded in different circumstances varies considerably. The Commission has identified three categories of relative choice by the parties:

a. independent neutrals offering services to the public through a free market, or public or private institutions in which parties have *full choice* of process, program and neutral;

b. public or private institutions in which parties have a choice of *some*, but not all, of the following: process, program and neutral; and

c. public or private institutions in which parties have *no choice* of process, program or neutral.

If one of the purposes of efforts to ensure competent practice is to protect the consumer, different approaches may be appropriate depending on the degree of freedom or ability that the parties have to choose and thus to protect themselves. Thus, SPIDR recommends:

P3. The extent to which qualifications for neutrals are mandated should vary by the degree of choice the parties have over the dispute resolution process, the program offering dispute resolution services, and the neutral. The greater the degree of choice, the less mandatory should be the requirements.

Based on this general principle, SPIDR suggests three basic strategies corresponding to the degree of choice by the parties:

4. First, SPIDR suggests that, despite its limitations, a free market should be relied on where parties have the opportunity to choose the process and neutrals themselves, so long as they are provided with complete and accurate information. Thus, for situations in which parties have free choice, SPIDR recommends:

P4. No standards or qualifications should be required that would prevent any person from providing dispute resolution services, when parties have free choice of the process, program, and individual neutral, provided that the parties are given access to the following information about the neutral:

- **a. prior training and experience relevant to the dispute resolution services to be provided;**
- **b. personal and/or previous business relationships with the parties;**
- **c. all financial interests that may have any bearing on the case;**
- **d. all fees and expenses charged;**
- **e. any code of ethics, such as SPIDR's Ethical Standards of Professional Responsibility, to which the neutral adheres;**
- **f. personal bias which, if judged by an objective standard, would affect the individual's performance as a neutral; and**
- **g. prior disciplinary action by any profession.**

5. In practice, SPIDR recognizes that the parties have varying degrees of freedom to choose among dispute resolution processes, programs, and neutrals. Numerous circumstances exist in which parties are required to participate in mediation or arbitration. Even where the parties come voluntarily to a particular program, such as a neighborhood justice center they may be assigned a particular mediator or arbitrator or limited in the scope of issues to be negotiated or decided. Without intending to imply that such assignment necessarily leads to more poorly qualified neutrals, SPIDR believes that lack of choice by the parties creates a greater reason for concern about consumer protection and, therefore, a greater need for public scrutiny of the criteria used to select these neutrals.

Where parties have no choice of process, program or neutral, they have more difficulty protecting themselves against incompetent neutrals. This situation exists where parties are required to go to mediation or arbitration prior to going to court, as is true under some state statutes involving disputed child custody, under typical court annexed arbitration schemes, and under some consumer warranty programs established pursuant to Rule 703 of the Magnusen Moss Consumer Product Warranty Act. The problem is particularly acute in the case of mandatory arbitration proceedings, in view of their binding effect. A somewhat comparable issue arises where brokers and their clients have "voluntarily" agreed to arbitrate any disputes in accordance with the standard provision of their form contract. Not surprisingly it is in these types of situations that legislatures and regulators have already taken the most active role to mandate specific qualifications.

Consequently, when the parties have no choice of process, program or neutral, SPIDR recommends:

P5. Where courts, public agencies, or private organizations operate programs that do not offer the parties a choice of the dispute resolution process, program, or neutral to which the parties must go to engage in that process, standards or qualifications for such programs and neutrals should be set by an appropriate public entity (typically the legislature or its delegee), in accordance with the principles set forth in this document. Information about such standards or qualifications should be made available to the parties.

6. Finally, where the parties have a choice of some -- but not all -- of the elements of process, program, or neutral, the elucidation of a general standard to govern qualifications is difficult. SPIDR's recommended approach is to require programs offering dispute resolution services to *disclose* their selection criteria but not to tell them what criteria they should use. Thus, when the parties have some, but not complete, choice of process, program, or neutral, SPIDR recommends:

P6. It is the responsibility of public and private programs offering dispute resolution services to define clearly the services they provide, to establish clear criteria for selecting intervenors and evaluating intervenor performance, to conduct periodic performance evaluations, and to offer the following information about the program and the neutral(s) to parties:

a. the criteria used for selecting and evaluating neutrals;

b. rules governing confidentiality;

c. the neutral's prior training and experience relevant to the dispute resolution services to be provided;

d. any personal or previous business relationships the neutral may have had with the parties;

e. any financial interest of the neutral that may have a bearing on the case;

f. fees charged, if any;

g. any code of ethics, such as SPIDR's Ethical Standards of Professional Responsibility, to which the neutral adheres;

h. its complaint mechanism; and

i. personal or programmatic bias, which, if judged by an objective standard, would affect the individual's performance as a neutral.

C. Performance-based qualifications.

The question of what criteria should be used for measuring competence is relevant, whether the approach to ensuring competence is disclosure of relevant information by the neutral, disclosure by programs of their criteria for selecting and evaluating neutrals, or mandated public standards regulating dispute resolution practice.

7. The most common requirement that has been imposed by state legislatures to date is the possession of an advanced degree from some related profession or discipline, such as law or mental health. The Commission knows of no evidence that formal degrees are necessary to competent performance as a neutral. Indeed, there is impressive evidence that some individuals who do not possess these credentials make excellent dispute resolvers. Furthermore, the requirement of a

graduate degree in any discipline clearly creates a significant barrier to the entry of many competent individuals into the profession. Thus, SPIDR recommends:

P7. Knowledge acquired in obtaining various degrees can be useful in the practice of dispute resolution. At this time and for the foreseeable future, however, no such degree in itself ensures competence as a neutral. Furthermore, requiring a degree would foreclose alternative avenues of demonstrating dispute resolution competence. Consequently, no degree should be considered a prerequisite for service as a neutral.

8-10. SPIDR believes that performance criteria (such as neutrality, demonstrated knowledge of relevant practices and procedures, ability to listen and understand, and ability to write a considered opinion for arbitrators) are more useful and appropriate in setting qualifications to practice than is the manner in which one achieves those criteria (such as formal degrees, training, or experience). Thus, SPIDR recommends:

P8. Training can be extremely useful in the practice of dispute resolution. It is one important way for neutrals to acquire relevant skills.

P9. Any requirements concerning who can practice as a neutral should be based on performance. In establishing requirements, any certifying bodies or agencies maintaining rosters or lists of "acceptable" neutrals should emphasize the knowledge and skills necessary for competent practice, not the education or other method by which an individual acquired the knowledge or skills.

P10. One goal of establishing standards should be to encourage and increase the diversity of practicing neutrals. Consequently, standards should be scrutinized carefully to avoid the exclusion of groups based on race, sex, age, handicap, nationality, religion, or sexual preference.

11. Clearly, if performance criteria are preferred to educational degrees, it is important to identify and measure the characteristics and capabilities that determine competence. While recognizing the difficulty of the task, the Commission believes that

it is possible to test for competence and well worth the effort it entails.[3] If performance can be evaluated, the way in which an individual achieves the necessary level of performance need not be a barrier to practice.

Performance-based testing is relatively new to dispute resolution but not to other skills (those of athletes and pilots, for example). To do it well can be time consuming, expensive, and subject to human error. Thus, it may not currently be feasible to expect all organizations or programs to rely on actual performance measures. As an alternative, experience can be a useful screening tool to identify those who can mediate or arbitrate and those who would benefit from further training. Criteria such as the amount and diversity of prior dispute resolution experience, the complexity of previous cases handled, and the amount and diversity of experience as a negotiator in similar cases all may be useful. Well designed training and apprenticeship programs, with significant personal observation and feedback, also may be able to provide an equivalent of competency testing. In addition, neutrals may improve their performance by seeking feedback from clients.

SPIDR recognizes that the inclusion or exclusion of particular performance criteria may depend on differing theories of dispute resolution. SPIDR recommends the following criteria as a starting point, based on current knowledge and practice, but encourages further discussion within the field:

P11. Policy makers setting standards for those who may practice as a neutral, programs developing their own criteria for the neutrals they employ or include on rosters, and organizations determining relevant information to disclose to parties should consider the following performance criteria:

a. Skills necessary for competent performance as a neutral include:

(1) General

(a) ability to listen actively;

(b) ability to analyze problems, identify and separate the issues involved, and frame these issues for resolution or decision making;

(c) ability to use clear, neutral language in speaking and (if written opinions are required) in writing;

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[3] Although additional work clearly is needed in this area, perhaps on a sector-by-sector basis, initial experiences with performance-based testing in court and community-based mediation programs have been encouraging.

(d) sensitivity to strongly felt values of the disputants, including gender, ethnic, and cultural differences;

(e) ability to deal with complex factual materials;

(f) presence and persistence, i.e., an overt commitment to honesty, dignified behavior, respect for the parties, and an ability to create and maintain control of a diverse group of disputants;

(g) ability to identify and to separate the neutral's personal values from issues under consideration; and

(h) ability to understand power imbalances.

(2) For mediation

(a) ability to understand the negotiating process and the role of advocacy;

(b) ability to earn trust and maintain acceptability;

(c) ability to convert parties' positions into needs and interests;

(d) ability to screen out non-mediable issues;

(e) ability to help parties to invent creative options;

(f) ability to help the parties identify principles and criteria that will guide their decision making;

(g) ability to help parties assess their non-settlement alternatives;

(h) ability to help the parties make their own informed choices; and

(i) ability to help parties assess whether their agreement can be implemented.

(3) For arbitration

(a) ability to make decisions;

(b) ability to run a hearing;

(c) ability to distinguish facts from opinions; and

(d) ability to write reasoned opinions.

b. Knowledge of the particular dispute resolution process being used includes:

(1) familiarity with existing standards of practice covering the dispute resolution process; and

(2) familiarity with commonly encountered ethical dilemmas.

c. Knowledge of the range of available dispute resolution processes, so that, where appropriate, cases can be referred to a more suitable process;

d. Knowledge of the institutional context in which the dispute arose and will be settled;

e. In mediation, knowledge of the process that will be used to resolve the dispute if no agreement is reached, such as judicial or administrative adjudication or arbitration;

f. Where parties' legal rights and remedies are involved, awareness of the legal standards that would be applicable if the case were taken to a court or other legal forum; and

g. Adherence to ethical standards.

12. The Commission does not believe that practice as an advocate necessarily disqualifies an individual from serving as a neutral. Indeed, such experience can be a useful way of acquiring some of the skills identified above. Consequently, SPIDR recommends:

P12. Practice as an advocate should not, on its own, disqualify any individual from qualification to practice as a neutral. However, individuals practicing as advocates have a duty to disclose that fact to the parties.

13. Reliance on performance-based criteria for establishing competence (whether that be done through disclosure, voluntary memberships in certifying associations, mandatory standards, or other methods) implies that, once qualified, an individual does not necessarily remain competent forever. Furthermore, criteria for qualification may change over time as the knowledge in this new field grows, thus creating a need for additional training. Thus, SPIDR recommends:

P13. Neutrals, programs, and entities sponsoring neutrals have an obligation to continue to improve neutrals' competence through additional training, study and practice.

14-16. To the extent that training is relied on for establishing or measuring competence, the trainers themselves must be qualified. Thus, SPIDR recommends:

P14. Programs or services offering training for neutral practitioners should establish clearly articulated qualifications for their trainers. Such qualifications should include the following criteria:

a. the qualifications required to practice as a neutral in the area for which the training is offered;

b. the ability to communicate clearly; and

c. the ability to evaluate the performance of others working in simulated situations.

P15. Trainers should provide appropriate feedback to both the trainee and the staff of the program or service for which the training program is conducted.

P16. Where training is required as a condition of practice, programs have an obligation to ensure that there is adequate training to meet program goals and sufficient evaluation of the performance ability of each individual trained to permit screening.

V. IMPLEMENTATION

In those instances in which this report recommends actions by public bodies, the Society of Professionals in Dispute Resolution recommends that legislators, courts, and administrative agencies use these principles to guide the development of standards concerning qualifications for neutrals. SPIDR also urges that public and private organizations that employ neutrals or include them in rosters use the principles to guide their policies.

In addition, SPIDR recognizes the need for a continuing national effort to develop more detailed information on qualifications applicable to different groups of neutrals -- using different processes, in disputes involving different issues, and working in a variety of institutional settings. Further work also is needed to develop feasible methods for implementation of performance-based criteria in different sectors and to design appropriate enforcement mechanisms.

SPIDR looks forward to working with colleagues in other organizations, both public and private, toward the implementation of these recommendations.

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STATEMENT OF

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1001 Pennsylvania Avenue, N.W.
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before

United States Senate

Committee on Governmental Affairs

Subcommittee on Oversight of Government Management

HEARING

September 19, 1989

on

Administrative Dispute Resolution Act

S.971

STATEMENT OF ELDON H. CROWELL

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Mr. Chairman, I would like to thank you for this opportunity to discuss with your Subcommittee the Administrative Dispute Resolution Act. Alternative Means of Dispute Resolution ("ADR") is a subject in which I have taken a keen personal interest, and in which our firm has played an active role in the context of government contract disputes. It is from the perspective of a private practitioner who specializes in government contracts law that I offer my comments today.

While representing the private industry in government contract disputes is a major component of our business, we share our clients' concern about the costs and delays inherent in the litigation process. In particular, private industry is concerned about the diversion of valuable management time and energy from productive activities, such as generating and performing new contracts, to the unproductive process of resolving disputes under contracts that may have been completed months or usually years before. It is for that reason that we support the proposed legislation, particularly Section Five encouraging use of ADR in government contract disputes.

I would like to begin my statement by reviewing the need for ADR in government contract disputes from a historical perspective. Second, I will address some of the initiatives that agencies and private parties have already taken to alleviate the burden of litigation in these types of disputes. Third, I will present my comments regarding the proposed legislation. And finally, I will address certain constitutional concerns that have been voiced concerning S. 971.

The Need For ADR From A Historical Perspective

Government contracting is a multi-billion dollar industry. The federal government contracts for a wide variety of goods and services ranging from sophisticated weapons system, such as fighter aircraft and nuclear submarines, to mundane items like office supplies and janitorial services. These contracts spawn disputes over such issues as pricing, specification ambiguities, changes, changed conditions, and contract interpretation. In recent years, such disputes have proliferated and their magnitude has markedly increased.

The principal fora for reviewing and deciding claims under government contracts traditionally have been the agency Boards of Contract Appeals. The Boards were created to provide informal, expeditious procedures for resolving disputes without disrupting the contracting process or draining the resources of contractors and the government. With the proliferation of disputes, however, the Boards have fallen prey to many of the conditions that have burdened court litigation -- overcrowded dockets, shortage of personnel and resources, and lengthy delays in hearing and deciding cases.

In addition, changes in Board procedures, prompted by demands of the government contracts bar as well as statutory mandates, have "judicialized" Board proceedings by creating costly and time-consuming discovery and motions practice. As a result, the Boards are often as inefficient and costly fora as the court system.

In fact, ADR is nothing new in government contracts. It dates to the early 1900's when the first formal appeals procedures were instituted. In 1918, a Board of Contract Adjustment was established in the War Department to resolve contract disputes which could not be settled by mutual agreement. Before the Board was disbanded in 1922, it had resolved more than 3000 cases. At approximately the same time, the Secretary of the Navy created a Compensation Board to conduct hearings and interviews for the purpose of dispute resolution. The Navy Board emphasized the use of Naval officers who were also leading technical and management experts. This Board operated until 1944 when it was replaced by the Navy Department Board of Contracts, which in turn was replaced, in 1949, by the Board of Contract Appeals.

With the onset of World War II, the number and magnitude of government contract disputes grew to such extraordinary proportions that other agencies began creating their own Boards. Until the early 1960's, these fora were rather informal and expeditious. In most cases, there was very little discovery, and the proceedings were conducted in a fashion more akin to arbitration than court trials. If the contractor lost at the Board level, it had the option to obtain a full-scale, de novo trial on the merits before the U.S. Court of Claims.

In the 1963 decision of United States v. Carlo Bianchi, 373 U.S. 709 (1963), the Supreme Court put an end to this practice when it held that findings of fact by the Boards of Contract Appeals on disputes arising under the contract were final and binding, subject only to judicial review on the administrative record in the Court of Claims. The Court ruled that a de novo hearing on the merits would no longer be available in the Court of Claims and that the Boards would be the only forums for hearing disputes under the remedy-granting clauses of the contract. Three years later, in United States v. Utah Construction & Mining Co., 384 U.S. 394 (1966), the Supreme Court decided that the Court of Claims would continue to exercise jurisdiction over breach of contract claims.

As a result of these Supreme Court decisions, the Boards became the only fora where government contractors could obtain an evidentiary hearing on disputes "arising under the contract." Contractors and the government contracts bar exerted pressure to give the Boards more of the trappings of courts, thus spawning rules changes allowing written and deposition discovery and providing for more structured, formalized hearings. Consequently, Board cases took longer to hear and became more expensive to resolve.

The culmination of this trend was the Contracts Dispute Act of 1978 ("CDA"). The CDA gave the Boards of Contract Appeals all powers granted to the Court of Claims, including, for the first time, the power to subpoena witnesses to depositions or hearings. The Act made the jurisdiction of the Boards and the Court of Claims essentially co-extensive and allowed contractors the option of appealing adverse agency decisions on contract disputes to either forum.

As a result, the Boards became essentially indistinguishable from the Court of Claims: they had the same powers, took the same amount of time to render a decision, cost the same amount of money, and resulted in the same diversion of management resources from both the contractors and the Government. A similar trend toward "judicialization" has occurred in administrative adjudications and rulemakings before other federal agencies.

ADR Initiatives in Government Contract Disputes

Dissatisfaction with our current system of resolving government contract disputes has prompted parties to utilize alternative methods of dispute resolution. On April 15, 1987, the U.S. Claims Court promulgated General Order No. 13, which established two methods of ADR -- the settlement judge and the minitrial. In many instances, settlement can be promoted through frank discussions of each party's viewpoint before a neutral settlement judge who plays no role in the prior or subsequent litigation of the case. Although these discussions can take place at any time during the proceedings, it is preferable that they be held as early as possible to eliminate unnecessary cost and delay. Through the use of this ADR technique, the parties obtain an impartial appraisal by a neutral judge regarding the strengths and weaknesses of their case, thus enhancing the possibility of an early, equitable settlement.

In our practice, we have had several occasions to participate in minitrials. Two of those proceedings bear special mention because they illustrate two very different, but successful, applications of this ADR technique. The first was a minitrial of a government contract dispute between the National Aeronautics and Space Administration ("NASA") and TRW, Inc. The dispute involved claims for over $100 million under a contract for the production of the Tracking and Data Relay Satellite System. The claims involved state-of-the-art concepts of space science and hundreds of thousands of pages of documents. Had the dispute been processed through the NASA Boards of Contract Appeals or the Claims Court, discovery would have dragged on for more than a year, the hearing would have taken several months, and the ultimate decision may have taken two or more years to prepare. Instead, the dispute was resolved through a one-day minitrial and subsequent negotiations between the parties. In that case, presentations were given by the attorneys to senior executives of TRW and NASA, and the dispute was resolved without the use of a neutral advisor.[1]

In 1985, a minitrial was used to resolve a $45 million claim by a contractor against the U.S. Army Corps of Engineers on the Corps' Tennessee-Tombigbee Waterway Project. The "Tenn-Tom" project involved the excavation and removal of 95 million cubic yards of earth over a three-year period. The contractor's claim was based upon the contention that its excavation activities had been impeded by differing site conditions -- i.e., soil conditions at the site that differed materially from the pre-bid geotechnical information provided to prospective contractors by the Government. An appeal was filed with the Corps of Engineers Board of Contract Appeals in late 1984, but proceedings were suspended by mutual consent to allow the minitrial to proceed.

The parties engaged in a two-and-one-half-day minitrial in which the evidence was presented through both lay and expert witnesses to senior executives of the Corps and the contractor, as well as a neutral advisor who was an expert in government contracts law. The parties resolved their dispute within a few days of the end of the minitrial with a payment that represented a substantial compromise between the two parties' litigation positions. Again, it was estimated that the minitrial saved months of formal discovery, as well as a lengthy trial before the Board of Contract Appeals.[2]

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[1] See Johnson, Masri, and Oliver, "Minitrial Successfully Resolves NASA-TRW Dispute," Legal Times, Sept. 6, 1982, c.1, p. 13.

The experience of these two minitrials illustrate a number of important points. First, the minitrial is a flexible mechanism that can be tailored to fit the facts of the dispute and the particular needs of the party. Thus, for example, the NASA-TRW dispute was resolved without the use of a neutral advisor, while the neutral played a significant role in the successful resolution of the Tenn-Tom dispute.

Second, minitrials save not only litigation costs, but mitigate one of the great hidden costs of litigation -- diversion of management and technical personnel to the litigation process.

Third, the success of ADR is highly dependent upon the attitude of the parties -- they must take a non-adversarial approach that is geared toward amicable resolution, rather than the concept of winning or losing. Thus, an important component of the minitrial program at the Claims Court, as well as the successful minitrial program implemented over the past several years by the Corps of Engineers, is that the Government and the contractor appoint as principal participants senior executives who had no direct involvement in the underlying dispute and who have full authority to settle.

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[2] See Ruttinger, "Army Corps of Engineers Settles $45 Million Claim at Minitrial," Alternatives to the Higher Cost of Litigation, vol. 3, no. 8 (Aug. 1985) at 1.

The Proposed Legislation

The proposed legislation implements many of the recommendations of the Administrative Conference set forth in its Recommendation 87-11, Alternatives for Resolving Government Contract Appeals. In particular, Section 5(a) of the bill would amend Section 6(a) of the CDA to require the Government's contracting officer to "make all reasonable efforts to resolve a claim or dispute consensually, before or after making a decision under this section." This provision recognizes the importance of exploring the use of ADR not only at the stage where a dispute has ripened into litigation, but also when a claim is still pending before the contracting officer. This affords the parties the opportunity to resolve a dispute quickly, before the litigation option is ever invoked.

The proposed legislation also eliminates one of the psychological impediments to the use of ADR by making it clear that the CDA was not intended to prevent the contractor and contracting officer from using ADR techniques to resolve contract disputes. This should eliminate the unfounded concern of some agency Boards of Contract Appeals and the General Accounting Office that the use of ADR may be somehow inconsistent with the mandate of the CDA that all government contracts appeals be resolved through the formal processes of the Boards or Claims Court.

Third, the proposed legislation would simplify the procedures for acquiring the services of private mediators and other neutral advisors by authorizing the Administrative Conference of the United States to establish standards for neutrals, maintain a roster of individuals who meet such standards, and enter into contracts for the services of neutrals who can then be used by other agencies for ADR proceedings. The Act would also give the Federal Mediation and Conciliation Service explicit authority to allow its mediators to act as neutrals in disputes involving other federal agencies.

Constitutional Concerns

Finally, you have asked me to address the constitutionality of S. 971. The constitutional issues that have been raised all relate to the bill's arbitration provisions. Specifically, concern has been voiced that the bill may violate separation of powers principles by improperly conferring legislative, executive or judicial functions upon private decisionmakers.

For reasons detailed by Professor Bruff in his report to the Administrative Conference of the United States -- in which he undertakes an exhaustive analysis of these and related issues -- I am persuaded that these constitutional concerns are more theoretical than real, and that the bill as it presently reads is plainly constitutional. See Bruff, "Public Programs, Private Deciders: The Constitutionality of Arbitration in Federal

Programs," Studies in Administrative Law and Procedure 88-1 7-42 (1988). Rather than rehearse Professor Bruff's analysis here, I will confine my comments to three points which, in my view, confirm the soundness of his conclusions.

First, this bill does not authorize arbitrators to exercise legislative or executive authority in any constitutionally significant sense. There is an important distinction between permitting an arbitrator to adjudicate a specific dispute between the federal government and a private party, on the one hand, and conferring upon the arbitrator significant policymaking authority, which may extend beyond resolving a particular dispute, on the other. As to the former situation -- where an arbitrator is asked simply to resolve a dispute between two consenting parties -- there are no serious constitutional concerns. It has long been recognized that Congress may vest adjudicative authority of this kind in tribunals that lack the attributes of Article III courts, including arbitration panels. See, e.g., Thomas v. Union Carbide Agric. Products Co., 473 U.S. 568, 583 (1985). Thus, there is nothing in the Constitution that would preclude the federal government from agreeing to submit discrete controversies to a private arbitration panel for resolution.

This point is confirmed by the number of federal statutes already on the books that permit the Government to enter into agreements to resolve disputes through binding arbitration. For example, under the terms of the Civil Service Reform Act of 1978, 5 U.S.C §7121(b), and Executive Order 11491, the Government submits certain labor disputes to binding arbitration. Similarly, in Schweiker v. McClure, 456 U.S. 188 (1982), the Supreme Court upheld against a due process challenge an arbitration scheme under which disputed Medicare payments are submitted to a private arbitrator for resolution without the right of further appeal. Schweiker is particularly notable in that the Court confirmed the scheme's constitutionality despite the fact that arbitration there was mandatory and there was no right to judicial review.

Constitutional issues might be raised here were this bill to authorize an arbitrator to play a substantial role in formulating agency policy or to make rules of general application that would affect persons beyond the context of a given dispute. In that case, a private party would arguably be exercising a policymaking function that the Constitution has historically reserved to those Branches of our government that are politically accountable. And, under such circumstances, the separation of powers concerns at issue in, for example, Buckley v. Valeo, 424 U.S. 1 (1976) and Bowsher v. Synar, 478 U.S. 714 (1986), might fairly be said to be implicated.

This bill, however, does not confer such policymaking power on arbitrators. Indeed, S. 971 includes several provisions specifically designed to safeguard against the possibility that important legislative, executive, or judicial functions might inadvertently be conferred upon private decisionmakers.[3/] For example, under the proposed legislation, agencies are instructed not to utilize alternative dispute resolution techniques where

> "a definitive or authoritative resolution of the matter is required for precedential value," (§582(b)(1));
>
> "the matter involves or may bear upon significant questions of Government policy that require additional procedures before a final resolution may be made," (§582(b)(2));
>
> "maintaining established policies is of special importance, so that variations among individual decisions are not increased," (§582(b)(3));
>
> "the matter significantly affects persons or organizations who are not parties to the proceeding," (§582(b)(4)); or
>
> where "a full public record of the proceeding is important" (§582(b)(5)).

In addition, the bill expressly provides that an arbitration award may not be "used as precedent or otherwise be considered in any proceeding." (§590(c)). Collectively, these provisions should minimize, if not altogether eliminate, the risk that core legislative, executive, or judicial functions might, under the guise of alternative dispute resolution, be assigned to a private decisionmaker.

The second important point to note is that the proposed legislation makes arbitration entirely voluntary. See §582(a)("Each agency may use a dispute resolution proceeding for the resolution of any issue in controversy that relates to an

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[3] Because arbitrators under this bill would perform only limited adjudicative functions on an individual case-by-case basis, they would almost certainly be deemed "inferior officers" for Appointments Clause purposes. See Morrison v. Olson, 108 S.Ct. 2597, 2608-09 (1988).

administrative program, if the parties agree to such procedures"); §585(a)(1)("Arbitration as provided by this subchapter may be used whenever all parties consent"). Thus, each federal agency and Executive Department retains the discretion, for whatever reason, to withhold from arbitration any particular dispute or class of disputes. Similarly, private parties may not be compelled to use arbitration or, for that matter, any other alternative dispute resolution mechanism. Moreover, the proposed legislation makes explicit that "[a]n agency may not require any person to consent to arbitration as a condition of entering into a contract or obtaining any benefit." (§585(a)(1)). In short, the fact that the mutual consent of the Government and all private parties is a precondition to submitting an issue or case to arbitration substantially reduces whatever constitutional concerns might otherwise attend this scheme.

Finally, this bill does not significantly affect or infringe upon the power of the federal courts. There is no attempt here to withdraw or curtail federal court jurisdiction. The alternative dispute resolution mechanisms contemplated by this legislation clearly supplement rather than displace agency and judicial fora. In this regard, the Supreme Court's observation in Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 855 (1986) is particularly apt:

> the decision to invoke this forum is left entirely to the parties and the power of the federal judiciary to take jurisdiction of these matters is unaffected. In such circumstances, separation of powers concerns are diminished, for it seems self-evident that just as Congress may encourage parties to settle a dispute out of court or resort to

> arbitration without impermissible incursions on the separation of powers, Congress may make available a quasi-judicial mechanism through which willing parties may, at their option, elect to resolve their differences.

Moreover, the latitude Congress enjoys to create alternative, non-Article III fora for the resolution of disputes is particularly expansive in the context of cases involving disputes between the federal government and private parties. See, e.g., Thomas, 473 U.S. at 585-89 (discussing "public rights" cases). It is, of course, precisely this class of cases to which the bill is addressed.

Conclusion

In conclusion, I support wholeheartedly the goals and provisions of the Administrative Dispute Resolution Act. The proposed legislation is carefully crafted to promote the effective use of ADR techniques, and achieves this goal in a manner consistent with the Constitution. If enacted, the bill would remove some of the barriers to expeditious and efficient resolution of disputes between agencies and private industry generally, and government contract disputes in particular.

Thank you.

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STATEMENT OF

PHILIP J. HARTER

ON BEHALF OF

THE AMERICAN BAR ASSOCIATION

BEFORE THE

UNITED STATES SENATE

COMMITTEE ON GOVERNMENTAL AFFAIRS

IN SUPPORT OF

S. 971, THE PROPOSED "ADMINISTRATIVE DISPUTE RESOLUTION ACT"

September 19, 1989

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September 19, 1989

Mr. Chairman and Members of the Subcommittee:

My name is Philip J. Harter. I am in the private practice of law here in Washington, and I am an adjunct professor of administrative law at the American University's Washington College of Law and the University of Maryland's School of Public Affairs.

I am pleased to appear today on behalf of the President of the American Bar Association, Stan Chauvin of Louisville, Kentucky, who regrets that he is unable to be here to outline the ABA's support for the enactment of S. 971.

By way of personal background, I served as the consultant to the Administrative Conference of the United States with respect to its Recommendation 86-3, "Agencies' Use of Alternative Means of Dispute Resolution," 1 CFR § 305.86-3 (June 20, 1986). I am the Chair of the Advisory Committee of the Bureau of National Affairs' Alternative Dispute Resolution Reporter. I hold M.A. and J.D. degrees from the University of Michigan.

Within the American Bar Association, I was the founding chair of the Committee on Dispute Resolution of the Section of

Administrative Law, was chair of its Committee on Separation of Powers, and was formerly a member of the Section's governing Council. I was also appointed by successive Presidents of the ABA to the Standing Committee on Dispute Resolution. Earlier, I was a consultant to its Coordinating Committee on Regulatory Reform.

The American Bar Association appreciates the opportunity to testify in support of S. 971, "The Administrative Dispute Resolution Act." The ABA is solidly behind the increased use of ADR techniques in appropriate circumstances. For example, the entire theme of our annual meeting this year was "Resolving Disputes in Pacific Ways." Thirty ADR-related programs were sponsored by various ABA entities, with about half enjoying the special Presidential Showcase status, which emphasized the use of ADR is a vast array of contexts. To highlight the Association's continuing belief in the utility of ADR techniques to the justice system our policy making House of Delegates adopted a resolution at the meeting last month:

> The American Bar Association supports continued use of and experimentation with "alternative" dispute resolution techniques, both before and after suit is filed, as necessary and welcome components of the justice system in the United States. ... All "alternative" dispute resolution techniques should assure that every disputant's constitutional and other legal rights and remedies are protected.

Moreover, Robert Raven, the outgoing President of the ABA, devoted much of his term to speaking in favor of alternative means of dispute resolution and continues to work to further these techniques.

In addition to supporting the broader use of ADR techniques generally, the ABA endorses their use by administrative agencies in particular. In August, 1988, it adopted a resolution providing in part:

> Administrative agencies should adopt alternative methods of dispute resolution for resolving a broad range of issues. These techniques include arbitration, factfinding, minitrials, and mediation. The issues for which they may be employed include matters that arise in formal or informal adjudication, in rulemaking, in issuing or revoking permits, and in settling disputes, including litigation brought by or against the government.

To that end, the ABA has supported the enactment of legislation that would codify the highly successful practice of regulatory negotiation. I testified last year in support of your bill, Mr. Chairman, S. 1504, the predecessor of this year's S. 303, "The Negotiated Rulemaking Act of 1989," which passed the Senate on August 3. We are working with your colleagues on the House side to help ensure that this bill soon becomes law.

Our resolution on administrative use of ADR continued, "Congress should act to permit executive branch officials to agree to binding arbitration to resolve controversies." The resolution then set out the ABA's views on the appropriate use of arbitration by administrative agencies. The pertinent part of the resolution is included in the Appendix to this statement. To emphasize our commitment, the ABA has adopted securing Congress's imprimatur for the increased use of ADR by Federal agencies as one of this year's 14 legislative priorities.

The ABA believes the procedures of S. 971 are fully consistent with its resolution. By encouraging agencies to use ADR techniques, by explicitly authorizing the use of arbitration, and by providing additional provisions supporting the use of ADR, the bill will equip agencies with powerful procedures that have been successfully used in the private sector for years. Moreover, the bill takes care to ensure that the constitutional protections and boundaries that are critical to last summer's resolution are carefully observed.

The ABA therefore heartily endorses the early passage of S. 971. We commend you, Mr. Chairman, and your very able staff for moving so expeditiously on the Negotiated Rulemaking Act and on this bill.

Background: Dispute Resolution and Administrative Law

To provide a setting for our support for S. 971, we think it is helpful to review the complex relationship between dispute resolution techniques and the development and expansion of the administrative process. The report of the Section of Administrative Law to the ABA's House of Delegates last year included the following discussion:

"The putative benefits of the various alternative means of dispute resolution are attractive indeed. Interestingly, some of the major reasons for the establishment of administrative programs and the use of administrative, as opposed to judicial, adjudication was to tap many of these same virtues. For example, one early case, which exhibited a residual concern and discomfort with agencies, characterized their benefits:

> [T]he obvious purpose of the legislation [is] to furnish a prompt, continuous, expert and inexpensive method for dealing with a class of questions of fact which are peculiarly suited to examination and determination by an administrative agency specially assigned to that task. The object is to secure ... an immediate investigation and a sound practical judgment, and the efficacy of the plan depends upon the finality of the determinations of fact with respect to the circumstances, nature, extent, and consequences of the [issues presented].[1]

"The benefits of administrative decisions have been described more recently as avoiding judicial delays, application of expertise, and their efficiency.[2] For example, Congress explained when creating one recent program that its procedure was intended to be an 'inexpensive and expeditious' alternative to existing fora, namely the courts and existing forms of arbitration.[3] Thus, the reasons giving rise to the current interest in arbitration and other forms of dispute resolution are a resounding echo of the very basis for the establishment of administrative agencies.

"But now agencies themselves face crushing caseloads and are themselves accused of exhibiting problems similar to those of the courts for which they were to be the cure. For example, a prestigious panel of the American Bar Association, following an extensive study, found severe shortcomings in the administrative process:

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[1] Crowell v. Benson, 285 U.S. 22 (1932).

[2] Administrative agencies are both efficient and speedy; and ... [a]gencies provide modern government with the informality of action and decisionmaking usually found in large private business enterprises. Mezines, Stein, and Gruff, Administrative Law (1983) at 1-13.

[3] S. Rep: No. 95-850, p. 11 (1978), concerning the reparations program of the Commodity Futures Trading Commission.

> We share the general view that many administrative procedures are too slow, costly and cumbersome. As a result, vital economic interests concerned with capital formation, plant modernization and business expansion are severely handicapped, and reforms necessary for the protection of workers and consumers are too long postponed. These delays and excessive costs have resulted, in considerable part, from the fact that administrative procedures, initially developed as a safeguard against the threat of regulatory abuse, have come to mimic the judicial process, with inadequate regard for the flexibility available under existing statutes. Improved procedures will serve all citizens, both as consumers and producers.[4]

"Former Attorney General William French Smith echoed these concerns in terms of direct impact on the Federal government:

> Increased use of adversarial procedures in the courts and administrative process has had serious consequences. Regulatory proceedings have become more lengthy and complex as a result of conflict between the government and private parties, and have all too often led to unnecessary and wasteful regulations. Moreover, lawsuits involving the government have become more numerous. The number of lawsuits in which the United States was a party grew by more than 155% in the last decade: from 25,000 new lawsuits a year in 1970 to 64,000 new lawsuits a year in 1980. The accompanying costs to the government have increased at an even greater rate, with legal expenses of federal agencies estimated to have more than tripled in the decade of the 70's. In a time of fiscal constraints, the government simply cannot afford these costs.[5]

"Even without the shortcomings of an excessive reliance on trial type procedures, alternative means of dispute resolution may have positive benefits beyond alleviating caseloads and resulting delay. Another prestigious, diverse panel found in its report to the Department of Justice concerning courts but in terms equally applicable to agencies:

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[4] American Bar Association, Commission on Law and the Economy, Federal Regulation: Roads to Reform (1979) at 92.

[5] Smith, Alternative Means of Dispute Resolution: Practices and Possibilities in the Federal Government, 1984 Mo. J. Dis. Res. 9, 10.

> Society cannot and should not rely exclusively on courts for the resolution of disputes. Other mechanisms may be superior in a variety of controversies. They may be less expensive, faster, less intimidating, more sensitive to disputants' concerns, and more responsive to underlying problems. They may dispense better justice, result in less alienation, produce a feeling that a dispute was actually heard, and fulfill a need to retain control by not handing the dispute over to lawyers, judges, and the intricacies of the legal system.[6]

"It is surely not surprising, therefore, that agencies, Congress, and private organizations are all anxious to find new ways to address the difficulties: Given their promise and use in the judicial setting, it is only logical that the alternative means of dispute resolution may also address real needs of the administrative process. And, indeed, that has been the case. Some of these dispute resolution techniques have demonstrated their utility to administrative agencies.[7] But, because of the peculiar requirements of the administrative process, in other instances the fit is not entirely comfortable. And, in some instances their use is clearly inappropriate."

Need for this Legislation

Given the enormous benefits that have been derived from the use of ADR in the private sector, it certainly seems laudable to encourage agencies to use ADR techniques when doing so would

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6. U.S. Department of Justice, Office of Legal Policy, Paths to Justice: Major Policy Issues of Dispute Resolution (1984).

7. See, ACUS Recommendations 82-4 and 85-5, 1 CFR §§ 305.82-4, 305.85-5.

further their missions at significant cost savings. Although many agencies are experimenting with their use in a variety of contexts, major impediments stand in the way of their systematic adoption.

Those techniques that are designed to help the parties negotiate a settlement of an issue in controversy -- such as mediation, facilitation, conciliation, or mini-trials -- their use may be resisted as inconsistent with the "culture" of the agency, as outside the traditional way of doing things. Some officials are doubtful as to their propriety on the grounds that their use may somehow be inconsistent with the procedures specified by Congress, even though the administrative process has always relied on settlements.[8] Also, the simple lack of familiarity with the concepts can lead to their disuse. Moreover, some private parties and agencies alike have expressed concern that, because of the highly uncertain state of the law,[9] materials that are shared in confidence during a negotiation may be used inappropriately, thereby inhibiting the use of consensual processes. And, agencies may not use these procedures as much as they would like simply because of the difficulty in expeditiously procuring qualified neutrals or other persons to effectuate these processes.

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[8] The settlement of cases and issues by informal methods is nothing new in Federal administrative procedure. In its Final Report, the Attorney General's Committee on Administrative Procedure pointed out ... that "even where formal proceedings are fully available, informal procedures constitute the vast bulk of administrative adjudication and are truly the lifeblood of the administrative process".

United States Department of Justice, Attorney General's Manual on the Administrative Procedure Act 48 (1947).

For example, although clearly authorized under existing law and actually used by the agency, Congress recently amended Superfund to build in a procedure to encourage settlements. Superfund Amendments and Reauthorization Act, 42 U.S.C. § 9622(e)(2).

[9] See Harter, Neither Cop Nor Collection Agent: Encouraging Administrative Settlements by Ensuring Mediator Confidentiality, 1988 ACUS 839, 41 Ad. L. Rev. ___ (1989).

Finally, some statutes limit the authority of agencies to settle matters. S. 971 addresses these problems responsibly.

As for arbitration, in which the neutral makes a decision that is binding on the parties,

> [t]he Comptroller General has interpreted an obscure and seemingly irrelevant statutory provision to prohibit agency use of arbitration in the absence of specific authorization.[10] Moreover, he has held that Congress' express authorization of agency use of arbitration in some instances indicates that agencies lack the authority to submit disputes to arbitration without it.[11]

Without appropriate safeguards, arbitration could be misused and deny litigants constitutional safeguards. It could also raise the constitutional issues of separation of powers and improper delegation of governmental authority. S. 971 takes those concerns into account and reflects a solid string of Supreme Court authority not only sanctioning but embracing arbitration.[12] We therefore find no constitutional impediments raised by S. 971.

The Arbitration Provided by S. 971 is Fully Constitutional

Because some doubts have been raised over the constitutionality of at least some aspects of using binding arbitration to resolve issues in controversy involving administrative agencies, we would like to outline our views as to why we believe the provisions of S. 971 meet all constitutional tests. We would be glad to address any specific concerns the Committee may have in a subsequent memorandum.

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[10] Footnote in the original:

31 U.S.C. § 1346 (1982). This section, enacted in 1909, 35 Stat. 1027, prohibits the use of public money for "the pay or expenses of a commission, council, board, or similar group, or a member of that group, unless that commission or board is "authorized by law." Id.

[11] Harter, *Points on a Continuum: Dispute Resolution Procedures and the Administrative Process*, 1 Admin. L. J. 141, 161 (1987)

[12] See generally, Bruff, *The Constitutionality of Arbitration in Federal Programs*, 1987 ACUS 533, and Harter, supra note 11, at 164-176, both of which were written before the Supreme Court decided *Shearson/American Express, Inc. v. McMahon*, 107 Sup. Ct. 2332 (1987) and *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 109 Sup. Ct. 1917 (1989) which sustained the use of arbitration for resolving securities claims.

The Use of Arbitration Is Completely Voluntary. The starting point in this analysis is the observation that, unlike some statutes, arbitration under this bill arbitration is totally discretionary: "[a]rbitration as provided by this subchapter may be used whenever all parties consent, either before or after a dispute has arisen." § 585(a)(1). Thus, arbitration is not forced on anyone; rather, all parties must affirmatively choose it, based on their own analysis that they would be better off for doing so. Perhaps the parties want a highly expert decisionmaker with first hand experience, such as an engineer, to make a determination about a structure or a road, or someone trained in some other appropriate discipline. Or, perhaps they desire an expeditious decision and do not want to wait the months or years it would take for a more formal process, in which case it may well be that an Administrative Law Judge or other presiding officer with familiarity and insight into the subject matter would be an appropriate arbitrator. The point is that arbitration would offer the parties -- and ALJs ‾ an additional administrative tool for resolving the immediate issue in controversy against existing policy and without building a body of precedent that will evolve into policy: its purpose is simply to settle the dispute quickly and fairly.

To ensure that a private party has an actual choice as to whether or not to use arbitration, the bill also prohibits an agency from requiring anyone to consent to arbitration as a condition of entering into a contract or obtaining any benefit. Thus, the bill would prohibit the practice used in the securities industry in which a customer must agree to resolve all disputes with the broker by means of arbitration as a condition of opening an account. The Supreme Court has twice approved the use of such schemes to resolve issues under the Securities Acts.[13] So that its limitation on the use of arbitration will be very clear, we suggest that the sentence, "An agency may not require any person to consent to arbitration as a condition of entering into a contract or obtaining any benefit," be made a separate paragraph § 585(a)(3). Doing so would emphasize that private parties are choosing arbitration as such in a separate decision and are not being forced to accept it as a condition receiving something else that they want.

If the Arbitration Involves the Government, an Agency Official Defines the Scope of the Proceeding. The bill provides that before an agency participates in an arbitration, an official who has the authority to settle the issue in controversy or who is explicitly authorized to consent to arbitration has agreed to it. § 585(b). Moreover, the parties, including of course an agency, may agree to define the limits of the arbitration, both as to the issues to be resolved and the boundaries of the resulting award. § 585(a)(1). Thus, arbitration is only used to resolve an issue in which an agency participates if an Executive Branch official makes an affirmative decision to do so, and that official can also define the scope of the proceeding.[14]

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[13] Shearson/American Express, Inc. v. McMahon, 107 Sup. Ct. 2332 (1987) and Rodriguez de Quijas v. Shearson/American Express, Inc., 109 Sup. Ct. 1917 (1989).

Guidelines and Limits are Placed on the Use of Arbitration. The bill establishes criteria that agencies and private parties are to consider before using arbitration to resolve a particular issue in controversy. § 582(b). For example, if the matter bears upon policy that would require additional or different procedures -- such as rulemaking or a decision by the agency head -- the agency and the parties are directed to consider whether the arbitration could nevertheless serve as a useful recommendation to the agency; arbitration is not the appropriate vehicle for setting final agency policy.[15]

Due Process Is Not Only Protected, In Some Ways It is Enhanced. The entire purpose of ADR techniques is to enable the parties themselves to design the process they will use to resolve their differences depending on the issues confronting them. Arbitration is the trial-type component of these techniques. The starting point in an arbitration proceeding is often a set of "default" procedures or rules that the parties can adopt or modify, but the parties themselves are free to choose the rigor of the proceeding they desire. Moreover, inasmuch as the arbitral award may not serve as an estoppel in any other proceeding nor used as precedent, § 590(c), the rights of both the parties to the arbitration and anyone who is not a party to the proceeding are fully protected against the application of the results to other issues. Thus, overly formal procedures that the parties do not believe are in their interest are not forced on them, as in the case of adjudication before a court or agency, so that procedural justice is actually increased. We simply must not be deluded into thinking that formal trials that mirror courtroom procedures are the only way to make society's decisions.

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[14] Thus, the President and his officers decide whether and when to use the process.

[15] See discussion infra at p. 19

Moreover, that arbitration is used only voluntarily would mean the party has consented to the process itself. Thus, it seems unlikely that anyone would raise a due process challenge. If such a challenge did materialize, the fact of participation alone would likely constitute a waiver of any of the specific accoutrements of a formal trial or other due process claims.[16] Moreover, the courts are available to protect against "arbitrators who abuse or exceed their powers."[17] That surely includes major procedural shortcomings.[18]

Indeed, the Supreme Court has explicitly approved on due process grounds programs that have far fewer procedural protections, such as the ability to participate in the selection of the arbitrator, than the one designed by S. 971.[19]

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[16] Commodity Futures Trading Commission v. Schor, 106 S.Ct. 3245 (1986).

[17] Thomas v. Union Carbide Agric. Prod. Co., 473 U.S. 568, 592 (1985).

[18] The Arbitration Act, under which an award issued pursuant to S. 971 would be reviewed, provides that a court "may make an order vacating the award upton the application of any party to the arbitration --

> (c) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced."

[19] Schweiker v. McClure, 456 U.S. 188 (1982).

The procedure defined in the bill meets due process concerns.

The Requirements of Article II Are Met. The allegation has sometimes been made that an arbitrator who makes a binding decision as envisioned in S. 971 would have to be appointed by the President with the advice and consent of the Senate. The contention is without merit.

Article II, § 2 of the Constitution provides:

> [The President,] by and with The Advice and Consent of the Senate, shall appoint ... all ... officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but Congress may by Law vest the Appointment of such inferior officers, as they think proper, in the President alone, in the Court of Law, or in the Heads of Departments.

Thus, if the arbitrator could be regarded as an officer of the United States, the Constitution would require that s/he be appointed by the President by and with the advice and consent of the Senate. As this Committee is no doubt aware, the Supreme Court recently analyzed what constitutes an "officer of the United States" when it upheld the constitutionality of the Independent Counsel provisions of the Ethics in Government Act of 1978.[20] The Court found several factors important in deciding that the Independent Counsel is an inferior officer of the United States, and hence need not be appointed by the President: (1) she was subject to removal by a higher Executive Branch official; (2) she was empowered to perform only certain, limited duties; (3) she was not authorized to formulate policy for the Government or the Executive Branch; (4) the office is limited in jurisdiction; and, (5) the office is temporary.

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[20] *Morrison v. Olson*, 108 S.Ct. 2597 (1988).

In the case of an arbitrator in S. 971: (1) While the bill does not provide that s/he may be removed by a higher Executive Branch official, the bill specifies that the parties are to participate in the selection of the arbitrator. Therefore, the arbitrator does not have the seniority of office which the Court's test appeared to invoke.[21] (2) An arbitrator is appointed for a single proceeding to resolve the issues in controversy designated by the parties, including an agency official if the Government is a party. Thus, s/he would have limited duties indeed. (3) The bill provides that arbitration is not appropriate for the development of policy[22] (4) The office is certainly limited in jurisdiction, those defined by the parties and the statute authorizing the use of arbitration. (5) The position is very temporary: the resolution of a single case. The position would usually last a week or two at best, although on occasion it might run somewhat longer.

Thus, under the Supreme Court's recent analysis it seems inescapable that the arbitrator is, at best, an inferior officer and hence need not be appointed by the President.[23] As a result, if the arbitrator is to be regarded as a government employee, it would be an "inferior officer" and Congress can vest appointment in the agency head.

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[21] Although we believe S. 971 meets any appointments clause requirements without it, we would not object to providing that the agency head could remove the arbitrator under the same conditions that the Attorney General can remove an independent prosecutor: "An arbitrator appointed under this subchapter may be removed from office, other than by impeachment and conviction, only by the personal action of the [agency head] and only for good cause, physical disability, mental incapacity, or any other condition that substantially impairs the performance of such [arbitrator]." See, 28 U.S.C. § 596(a)(1). Any removal should also be subject to judicial review, as in the case of the Independent Counsel, to ensure the impartiality of the adjudicatory proceeding before the arbitrator. See, 28 U.S.C. § 596(a)(3).

[22] See §§ 582(b) and 591(b).

But, several arbitration schemes have been approved by the Court that use wholly private arbitrators. Whereas at one time the Environmental Protection Agency determined how much a subsequent registrant of a pesticide must pay for the use of another company's data, Congress changed the program to use the services of private arbitrators.[24] And, private arbitrators make certain determinations under Medicare.[25] Thus, it is fully constitutional under the design of S. 971 to have the arbitrator remain a private citizen.

Finally, it bears reemphasizing that the Government will not participate in any arbitration unless a duly authorized official -- either an officer of the United States or someone who is subordinate to such an officer -- makes the decision to do so; that person has the authority to define the scope of the entire proceeding to ensure that a resulting decision is within the officer's authority to settle the matter.

The Arbitration is Consistent with Article III. The Supreme Court has upheld an administrative arbitration scheme in part on the grounds that it preserved "an appropriate exercise of the judicial function" to protect against "arbitrators who abuse or exceed their powers or willfully misconstrue their mandate under governing law."[26] Under similar analysis, the Court recently rejected an Article III challenge to the CFTC's deciding state law claims as pendant jurisdiction to its resolving a reparations case.[27] That the arbitration envisioned by S. 971 would be used voluntarily to decide issues that would otherwise be resolved by an agency and the arbitral award would be subjected to judicial enforcement and review under the Arbitration Act would surely indicate the Constitutionality of the program.

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[23] This analysis is especially the case inasmuch as there could not be any possible allegation of Congressional usurpation of Executive power. In such instances, the Court has taken a far more formalistic, structural approach in deciding Separation of Powers issues. Compare Bowsher v. Synar, 106 S.Ct. 3181 (1986) and INS v. Chada, 462 U.S. 919 (1983) with Morrison v. Olson, 108 S.Ct. 2597 (1988), Commodity Futures Trading Commission v. Schor, 106 S.Ct. 3245 (1986), and Thomas v. Union Carbide Agric. Prod. Co., 105 S.Ct. 3325 (1985).

[24] See Thomas v. Union Carbide Agric. Prod. Co., 105 S.Ct. 3325 (1985).

[25] Schweiker v. McClure, 456 U.S. 188 (1982).

Specific Comments on S. 971

The American Bar Association supports S. 971 as written and has no major qualms with any of its provisions. We do offer the following comments and suggestions as to some of its provisions.

§ 581(5)(A). The word "settlement" should be "dispute resolution."

§ 584. Confidentiality. The section as drafted does not provide any sanctions if a party or neutral discloses confidential material in violation of its standards. We propose, therefore, adding a new section (c) and moving the remaining sections down a level:

> (c) Any dispute resolution communication or dispute resolution document that is disclosed in violation of subsection (a) or (b) shall not be admis-

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[26] *Thomas v. Union Carbide Agric. Prod. Co.*, 473 U.S. 568, 592 (1985).

[27] *Commodity Futures Trading Commission v. Schor*, 106 S.Ct. 3245 (1986).

> sible in any proceeding relating to the issues in controversy with respect to which the communication or document was made.

This new section would provide that anything revealed in contravention of the standards of the bill could not be used against a party in any other proceeding relating to the issues in controversy, whether it is an arbitration or a hearing before an agency or court. In that way, the parties would be protected against having the material held against them, even if they would not be able to undo its public disclosure.

§ 585(a)(1). As discussed above, to emphasize its importance, we believe the sentence "An agency may not require any person to consent to arbitration as a condition of entering into a contract or obtaining any benefit" should be separate subsection. We propose making is § 585(a)(3).

§ 588. Authority of the Arbitrator. This section would authorize an arbitrator to issue subpoenas, although it limits their use to ensure that the material sought is clearly relevant to the resolution of the issues and to achieve justice. Some agencies do not have subpoena power for certain programs, so that if enacted, an arbitrator would have authority to subpoena material that the agency itself lacked. This seems clearly inappropriate. Thus, we suggest that § 588(3) be modified to read

> (3) issue subpoenas for the attendance of witnesses and production of evidence at the hearing, enforceable under the provisions of section 7 of Title 9, except that --
>
> > (A) subpoenas may be issued under this paragraph only to the extent the agency involved is otherwise authorized by law to do so, and

> (B) no subpoena shall be issued except for material that is clearly relevant to the resolution of the issues and is necessary to achieve justice in the matter; and

§ 591. Judicial Review. As a technical matter, paragraph (b) of this section would amend Section 10 of Title 9, which is the judicial review section of the Arbitration Act. Since the entirety of Section 4 of S. 971, which contains § 591, amends Title 5, the text of what is now § 591(b) would be better located as a separate section of S. 971. For example, it might be moved to a new Section 5 of S. 971, and hence independently provide for the amendment of Title 9.

As to the section's substance, first we need to point out that there is a typographical error in the section: what now reads "§ 589(b)" should be § 582(b). Second, we wish to highlight the critically important role this section plays. § 582(b) sets out a number of factors that a Government official is to consider before agreeing to submit an issue in controversy to arbitration. The factors include such items as whether the proceeding would involve or bear upon significant questions of policy or whether persons or organizations which are not parties would be significantly affected. In either event, arbitration would not be appropriate unless the proceeding itself can be structured to avoid those effects.

Section 591(a) of S. 971 provides generally that an award issued in a proceeding authorized by the bill would be subjected to the narrow scope of review normally accorded arbitral awards.

Since it would be inappropriate to use arbitration if doing so would run counter to the factors of § 582(b), the court should review the proceeding to ensure that the matters arbitrated are not inappropriate. On the other hand, the purpose of arbitration is to reach finality expeditiously under procedures that are designed to ensure quality control and allegiance to law and fact.[28] Thus, it would be inappropriate to have a court make too intrusive an inquiry which could derail finality in even frivolous claims. To balance these needs, the bill quite appropriately directs the court to review the agency's agreement to use arbitration to resolve the matter and to reverse the agency if it finds the agreement constituted a gross abuse of discretion in light of the factors set out in § 582(b). The "gross abuse" standard would mean the court should pay considerable deference to the agency's decision, but should nevertheless reverse if the court decides the agency was plainly wrong.

§ 591(c). Judicial Review. We agree, of course, that an agency's decision whether to use or not to use arbitration or any other form of dispute resolution should not be subject to judicial review. Moreover, an agency, like any other participant, must be entirely free to terminate a dispute resolution proceed-

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[28] Arbitration is sometimes challenged as simply "splitting the difference." Such allegations lack empirical evidence and run counter to the experience of many satisfied users. Indeed, as the Supreme Court observed a couple of months ago:

> "By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial forum." [Quoting from Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985), which upheld an agreement to arbitrate involving an anti-trust claim.] To the extent that Wilko [which invalidated an agreement to arbitrate a dispute arising under the Securities Act] rested on suspicion of arbitration as a method of weakening the protections afforded in the substantive law to would-be complainants, it has fallen far out of step with our current strong endorsement of the federal statutes favoring this method of resolving disputes.

Rodriguez de Quijas v. Shearson/American Express, Inc., 109 S.Ct. 1917, 1920 (1989).

ing in which the decision is made by the parties themselves; thus an agency or a private party can decide at any time to forgo continuing in a mediation. No court should second guess that decision: if one is to voluntarily participate in a consensual process, one also needs the ability to withdraw at any time; no one can be ordered by a court to agree to something.

In an arbitration, however, the arbitrator makes the decision, and neither an agency nor a private party should be able to terminate an arbitration proceeding once it has begun simply because their case is going badly. That would argue in favor of not permitting an agency or other party from terminating an arbitration proceeding once it has begun except on the pain of default, as is done in commercial arbitration, where the arbitrator makes the award on the evidence whether or not the party is present.

But, it may become clear after an arbitration proceeding begins that, under the standards governing the use of arbitration, the matter should not be arbitrated. For example, it may become evident after a proceeding has begun that its resolution will require the development of new policy or will affect people who are not parties to the proceeding. The agency must be able to terminate such a proceeding if continuing would be inconsistent with the standards established by the bill in § 582(b). Moreover, if the agency does terminate the proceeding on these grounds, there is no arbitral award and hence the highly restrictive scope of judicial review would not be appropriate. Rather, the standard of review should be the one traditionally applied to administrative action. We therefore propose changing § 591(c) to read:

> Any agency action relating to decisions to use or not to use a dispute resolution proceeding shall not be subject to judicial review. An agency may terminate an arbitration proceeding authorized by this subchapter only on the ground that continuing the proceeding would be inconsistent with the factors set forth in section 582(b). A decision to so terminate such a proceeding shall be subject to review under section 706 of this title.

Section 8. Use of Nonattorneys. Although it might come as a bit of surprise to hear the American Bar Association supporting this section which directs agencies to modify their rules of practice to permit non-attorneys to represent parties when the proceeding does not necessitate representation or assistance by an attorney, in fact the ABA does so.

Conclusion

The American Bar Association supports S.971 as authorizing agencies to use these common-sense, "back to basics" procedures. Doing so will provide agencies with new procedures that can used to address particular types of problems, just as the establishment of the administrative process itself was used to provide our citizens with new means of resolving controversies that the courts were not equipped to handle. Moreover, the bill establishes important additional mechanisms, such as confidentiality and guidelines for the use of the techniques, that will encourage their responsible use.

We will be glad to address any specific questions you may have and to work with you and your staff in securing its expeditious enactment.

Thank you, Mr. Chairman.

Appendix: American Bar Association Resolution on Use of Arbitration by Administrative Agencies

The following recommendation of the Section of Administrative Law was adopted by the House of Delegates of the American Bar Association in August, 1988, as the ABA's formal policy.

October 11, 1987

AMERICAN BAR ASSOCIATION
SECTION OF ADMINISTRATIVE LAW

AGENCIES' USE OF ALTERNATIVE MEANS OF DISPUTE RESOLUTION

The Section of Administrative Law recommends that the American Bar Association support the increased use of alternative means of dispute resolution by Federal administrative agencies consistent with the following principles:

1. Administrative agencies should adopt alternative methods of dispute resolution for resolving a broad range of issues. These techniques include arbitration, factfinding, minitrials, and mediation. The issues for which they may be employed include matters that arise in formal or informal adjudication, in rulemaking, in issuing or revoking permits, and in settling disputes, including litigation brought by or against the government.

2. Congress and the courts should not inhibit agency uses of the ADR techniques by requiring formality where it is inappropriate.

3. Congress should act to permit executive branch officials to agree to binding arbitration to resolve controversies. This legislation should authorize any executive official who has auth-

ority to settle a matter on behalf of the government to agree to arbitration, either prior to the time a dispute may arise or after a controversy has matured, subject to whatever may be the statutory authority of the Comptroller General to determine whether payment of public funds is warranted by applicable law and available appropriations.

4. Congress should authorize agencies to adopt arbitration procedures to resolve matters that would otherwise be decided by the agency pursuant to the Administrative Procedure Act ("APA") or other formal procedures. These procedures should provide that:

(a) All parties to the dispute must knowingly consent to use the arbitration procedures, either before or after a dispute has arisen.

(b) The parties have some role in the selection of arbitrators, whether by actual selection, by ranking those on a list of qualified arbitrators, or by striking individuals from such a list.

(c) Arbitrators need not be permanent government employees, but may be individuals retained by the parties or the government for the purpose of arbitrating the matter.

(d) Agency review of the arbitral award be pursuant to the standards for vacating awards under the U.S. Arbitration Act, 9 U.S.C. § 10, unless the award does not become an agency order or the agency does not have any right of review.

(e) The award includes a brief, informal discussion of its factual and legal basis, but neither formal findings of fact nor conclusions of law.

(f) Any judicial review is pursuant to the limited scope-of-review provisions of the U.S. Arbitration Act, rather than the broader standards of the APA.

(g) The arbitral award is enforced pursuant to the U.S. Arbitration Act but is without precedential effect for any purpose.

5. Factors bearing on agency use of arbitration are:

(a) Arbitration is likely to be appropriate where --

(1) The benefits that are likely to be gained from such a proceeding outweigh the probable delay or costs required by a full trial-type hearing.

(2) The norms which will be used to resolve the issues raised have already been established by statute, precedent, or rule or the parties explicitly desire the arbitrator to make a decision based on some general standard, such as "justice under the circumstances," without regard to a prevailing norm.

(3) Having a decisionmaker with technical expertise would facilitate the resolution of the matter.

(4) The parties desire privacy, and agency records subject to disclosure under the Freedom of Infor-

mation Act are not involved.

(b) Arbitration is likely to be inappropriate where --

(1) A definitive or authoritative resolution of the matter is required or desired for its precedential value.

(2) Maintaining established norms or policies is of special importance.

(3) The case significantly affects persons who are not parties to the proceeding.

(4) A full public record of the proceeding is important.

(5) The case involves significant decisions as to government policy.

Congressional Research Service
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Washington, D.C. 20540

August 17, 1989

TO : Senate Committee on Governmental Affairs
Subcommittee on Oversight of Government Management
Attention: Melinda Loftin

FROM : American Law Division

SUBJECT : Constitutional Issues Raised by S. 971, 101st Congress, the Administrative Dispute Resolution Act

This memorandum is furnished in response to your request for information on the above subject. The constitutional issues raised by S. 971 involve complex questions concerning the separation of powers of the three branches of government. We hope that the discussion below addresses these questions adequately, even though, due to your time constraint, we are not able to address them in the depth that they might warrant.

Section 4 of S. 971 would amend the Administrative Procedure Act, 5 U.S.C. §§ 551 *et seq.*, to authorize federal agencies to "use a dispute resolution proceeding for the resolution of any issue in controversy that relates to an administrative program, if the parties agree to such procedures" (§ 582(a)).[1] An "'administrative program' means any program administered by an agency and includes a Federal function which involved protection of the public interest and the determination of rights, privileges, and obligations of private persons through rulemaking, adjudication, licensing, or investigation . . ." (§ 581(2)). Thus, dispute resolution proceedings would be authorized for virtually all agency matters.

A "dispute resolution proceeding" would include, but not be limited to, "settlement negotiations, conciliation, facilitation, mediation, factfinding, minitrials, and arbitration" (§ 581(3),(6)). Dispute resolution proceedings would be run by a "neutral," who would be a "government employee or a private individual who is acceptable to all the parties to a dispute resolution proceeding" (§ 583). Although participation in a dispute resolution proceeding would be voluntary, agreements to arbitrate would be enforceable under 9 U.S.C. § 4 (§ 586)[2], and arbitration awards would be enforceable under 9 U.S.C. § 9 (§ 590).[3] Any person adversely affected or aggrieved by an award made in a dispute resolution proceeding could bring an action only pursuant to 9 U.S.C. §§ 9-13 (§ 591).[4]

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[1] Sections 5, 6, and 7 of S. 971 would amend, respectively, three other federal statutes: (1) the Contact Disputes Act of 1978, 41 U.S.C. § 606(a), to facilitate alternative means of dispute resolution under that law; (2) the Labor Management Relations Act, 29 U.S.C. § 173, to authorize the Federal Mediation and Conciliation Service to make its services available to federal agencies to aid in the resolution of disputes; and (3) the Federal Tort Claims Act, 28 U.S.C. § 2672, to authorize the use of arbitration or other means of dispute resolution to settle tort claims against the United States.

The bill provides that "[e]ach agency shall designate a senior official to be the dispute resolution specialist of the agency. 'Such official shall implement . . . the provisions of this Act with regard to such agency" (§3(b)). Beyond this general statement, the bill does not specify who would choose the arbitrator. However, it provides, as noted, that the neutral would have to be acceptable to all the parties to the proceeding (§ 583), and also that the parties would "be entitled to participate in the selection of the arbitrator" (§ 587). Thus, the parties would appear to have veto power over the selection of a particular arbitrator, which would lessen the power of the agency with respect to selection of the arbitrator. Nevertheless, the bill should probably be understood to give the agency the power to select the arbitrator -- the parties, after all, would be entitled to *participate* in the selection of the arbitrator, not to select him -- with the parties' veto power effectively constituting the power to refuse to arbitrate, not the power to require selection of a particular arbitrator.

In a statement published in the record of hearings on the 100th Congress version of S. 971, Professor Harold H. Bruff succinctly stated the constitutional issues raised by the bill:

> There are three potential constitutional obstacles to the use of Alternative Dispute Resolution (ADR) in federal programs. These obstacles concern only arbitration and no other forms of ADR, because arbitration is the only form that actually shifts some decisionmaking power into private hands. The constitutional issues involve article II limits on the exercise of executive power, article III limits on placing

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[2] Under 9 U.S.C. § 4, a party aggrieved by a failure of another to arbitrate under a written agreement for arbitration may petition any United States District court which, but for the agreement, would have jurisdiction in a civil action arising out of the controversy, for an order directing the arbitration to proceed.

[3] Under 9 U.S.C. § 9, a party may apply to a federal district court for a judgment confirming an arbitration award.

[4] The grounds upon which a federal court may vacate an arbitration award are set forth in 9 U.S.C. § 10, with a new ground added to that section by § 591(b) of S. 971. The grounds are that "the award was procured by corruption, fraud, or undue means"; that "there was evident partiality or corruption in the arbitrators"; that "the arbitrators were guilty of misconduct" or "exceeded their powers"; and (the new ground) that "the consent of the agency to use arbitration to resolve the issues in controversy was gross abuse of discretion."

> federal judicial power in private hands, and due process constraints.[5]

We will consider these three issues in turn.

Article II

The Appointments Clause of the Constitution (Art. II, § 2, cl. 2) provides that the President "shall have Power, by and with the Advice and Consent of the Senate," to appoint "Officers of the United States," but that "Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of law, or in the Heads of Departments."

In *Buckley v. Valeo*, 424 U.S. 1, 141 (1976), the Supreme Court held that persons performing functions required by the Constitution to be performed by Officers of the United States must be appointed in accordance with the Appointments Clause. Such functions are those that are not "merely in aid of congressional authority to legislate," but that instead constitute "a significant governmental duty exercised pursuant to a public law." We may assume that arbitrators under S. 971 would exercise significant governmental duties, and therefore must be appointed pursuant to Article II.

Article II "for purposes of appointment . . . divides all its officers into two classes. As we stated in *Buckley v. Valeo*, [p]rincipal officers are selected by the President with the advice and consent of the Senate. Inferior officers Congress may allow to be appointed by the President alone, by the heads of departments, or by the Judiciary." *Morrison v. Olson*, 108 S.Ct. 2597, 2609 (1988) (citations omitted). In *Morrison v. Olson*, the Court held that the independent counsel appointed by a special court (the Special Division) under the Ethics in Government Act of 1978, 28 U.S.C. §§ 49, 591 *et seq.*, "clearly falls on the 'inferior officer' side of that line [between the two types of officers]." The reasons the Court gave for this conclusion would also apply to arbitrators under S. 971:

> First, appellant is subject to removal by a higher Executive Branch official. . . . Second, appellant is empowered by the Act to perform only certain, limited duties . . . [that do] not include any authority to formulate policy for the Government or the Executive Branch, nor does it give appellant any administrative duties outside of those necessary to operate her office. . . . Third, appellant's office is limited in jurisdiction. . . . [A]n independent counsel can act only within the scope of the jurisdiction that has been granted by the Special Division pursuant to a request by the

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[5] Alternative Dispute Resolution Use by Federal Agencies, *Hearings before the Subcomm. on Administrative Law and Governmental Relations of the House Committee on the Judiciary*, 100th Cong., 2d Sess. 99 (June 16, 1988).

> Attorney General. Finally, appellant's office is limited in tenure. . . . [T]he office of independent counsel is "temporary" in the sense that an independent counsel is appointed essentially to accomplish a single task, and when that task is over the office is terminated [108 S.Ct. at 2608-2609].

Thus, arbitrators under S. 971 apparently would be inferior officers who, under Article II, may be appointed by the "Heads of Departments." As indicated above, that is apparently who would appoint arbitrators, although S. 971 is not entirely clear on the point.

However, even if arbitrators were not appointed in accordance with Article II, it seems unlikely that there would be a constitutional problem. This is because what was at issue in *Buckley* was whether the Congress had usurped the President's powers, and *Buckley* stated that the "Framers regarded the checks and balances that they had built into the tripartite Federal Government as a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of another." 424 U.S. at 122. Subsequently, the Court has suggested that it will find a separation of powers problem where there is such a "question of the aggrandizement of congressional power at the expense of a coordinate branch." *Commodity Futures Trading Commission v. Schor*, 478 U.S. 833, 856 (1986); *see*, *Morrison v. Olson*, 108 S.Ct. at 2620. In *Buckley*, Congress had vested in itself the power to appoint Officers of the United States. Under S. 971, there would be no such aggrandizement.

A related separation of powers question would arise from the charge that Congress would unconstitutionally interfere with executive power by providing for agency decisionmaking to be performed by private parties, rather than by officers of the United States, even if appointed in accordance with Article II. One response to this charge is that private arbitrators would be officers for the purpose of the case they are arbitrating. The leading case in which the Supreme Court struck down a delegation of governmental power to private parties involved a situation in which the private parties to whom decisionmaking authority was delegated were interested in the matter to be decided and were permitted to decide on the basis of their own interests. In *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936), the Court invalidated a federal statute that allowed a majority of miners and the producers of two-thirds of the annual tonnage of coal to set maximum hours and minimum wages for the industry. The Court wrote:

> The power conferred upon the majority is, in effect, the power to regulate the affairs of an unwilling minority. This is legislative delegation in its most obnoxious form; for it is not even delegation to an official or an official body, presumptively disinterested, but to private persons whose interests may be and often are adverse to the interest of others in the same business [298 U.S. at 311].

In contrast with *Carter*, delegations to private parties have been upheld where the private party's decision was subject to review by a federal agency. For example, in *Todd & Co., Inc. v. Securities & Exchange Commission*, 557 F.2d 1008 (3d Cir. 1977), the court upheld a federal statute that authorized the Commission to register a private organization of securities dealers to discipline members. The court based its decision on the fact that the private organization's "rules and its disciplinary actions were subject to full review by the S.E.C., a wholly public body, which must base its decision on its own findings." *Id.* at 1012-1013. S. 971 would provide not for agency review, but for judicial review, although not "full review," but rather limited review as described in footnote 4 of this memorandum. However, unlike in *Todd*, an arbitrator under S. 971 would be a disinterested party. Furthermore, limited review of arbitrators' decisions, similar to that prescribed in S. 971, was upheld by the Supreme Court in another context, in *Thomas v. Union Carbide Agricultural Products Co.*, 473 U.S. 568 (1985), which is discussed below.

Article III

Article III, section 1, of the Constitution provides that the judicial power of the United States shall be vested in one supreme court, and in such inferior courts as Congress may establish, and that the judges of both the supreme and inferior courts shall hold life tenure "during good Behavior," at an irreducible compensation. Federal courts created under this provision are commonly known as "Article III courts." In addition, however, Congress, pursuant to its powers enumerated in Article I, may establish Article I "legislative" courts in "specialized areas having particularized needs and warranting distinctive treatment." *Palmore v. United States*, 411 U.S. 389, 408 (1973). Article I judges need not be granted life tenure or irreducible salaries.

The Supreme Court "has identified three situations in which Art. III does not bar the creation of legislative courts." *Northern Pipeline Construction Co. v. Marathon Pipeline Co.*, 458 U.S. 50, 70 (1982). These three situations are territorial courts, military courts, and courts created to adjudicate cases involving "public rights." *Id.* at 64-70. With respect to the third situation, *Marathon* elaborated:

> [A] matter of public rights must at a minimum arise "between the government and others." In contrast, "the liability of one individual to another under the law as defined," is a matter of private rights. Our precedents clearly establish that *only* controversies in the former category may be removed from Art. III courts and delegated to legislative courts or administrative agencies for their determination. Private-rights disputes, on the other hand, lie at the core of the historically recognized judicial power. *Id.* at 69-70 (emphasis in original; citations omitted).

In *Marathon*, a plurality of the Court held that the establishment of bankruptcy courts under Article I did not fall within any of the historically recognized situations in which Article III does not apply, and therefore was unconstitutional.

In two more recent cases, however, the Supreme Court rejected the public rights/private rights distinction as "a bright line test," and has focused on "substance"; *i.e.*, on the extent to which the particular grant of jurisdiction to an Article I court threatens judicial integrity and separation of power principles. These cases were *Commodity Futures Trading Commission v. Schor*, *supra*, and *Thomas v. Union Carbide Agricultural Products Co.*, *supra*. We will discuss the latter, as it upheld an arbitration scheme.

A majority of the Court in *Thomas* held that *Marathon* "establishes only that Congress may not vest in a non-Article III court the power to adjudicate, render final judgment, and issue binding orders in a traditional contract action arising under state law, without consent of the litigants, and subject only to ordinary appellate review." 473 U.S. at 584. Furthermore, *Thomas* held that public right cases, in which Article I courts are permissible, are not limited to those involving disputes between the government and an individual.[6]

Thomas upheld the provision of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. §§ 136 *et seq.*, which mandates binding arbitration with only limited judicial review as the mechanism for resolving disputes among private parties. The Court cited the fact that "the right created by FIFRA is not purely a 'private' right, but bears many of the characteristics of a 'public' right" (*id.* at 589); that "no unwilling defendant is subjected to judicial enforcement power as a result of the agency 'adjudication'" (*id.* at 591); and that FIFRA, while it limits, "does not preclude review of the arbitration proceeding by an Article III court" (*id.* at 592). The Court elaborated with respect to the last point:

> FIFRA at a minimum allows private parties to secure Article III review of the arbitrator's "findings and determinations" for fraud, misconduct, or misrepresentation. . . . This provision protects against arbitrators who abuse or exceed their powers or willfully misconstrue their mandate under the governing law. . . . Moreover, review of constitutional error is preserved . . . and FIFRA, therefore, does not obstruct whatever judicial review might be required by due process [*id.* at 592].

Note that these facts cited by the Court also, to a large extent, describe the scheme that S. 971 would establish. Arbitration under S. 971 would be voluntary, and would provide for limited judicial review similar to that provided for by FIFRA. At first blush it might appear that FIFRA and S. 971 differ in that the grounds for judicial review under S. 971 (see footnote 4 of this memorandum) do not explicitly include review of constitutional error. However, it appears that review of constitutional error is not explicitly preserved in FIFRA either (the relevant portion of the statute is set out in *Thomas*, 473 U.S. at 574 n.1), but that it is implicit in both FIFRA and S. 971.[7]

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[6] The Court cited this last feature of *Thomas* with approval in *Granfinanciera v. Nordberg*, 57 U.S.L.W. 4898 (U.S. June 23, 1989).

Due Process

The Fifth Amendment to the Constitution provides that no person shall "be deprived of life, liberty, or property, without due process of law." "[D]ue process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). S. 971 would seem likely to withstand a due process challenge because it would not force any party to arbitrate, and because it would provide for judicial review of the due process violations set forth in 9 U.S.C. § 10. This conclusion is based on the fact that, in *Schweiker v. McClure*, 456 U.S. 188 (1982), the Supreme Court upheld an arbitration scheme in which parties seeking to appeal denials of benefits were required to participate and which did not provide for review. Specifically, the Court held that Congress had acted "consistently with the requirements of due process" in providing "that hearings on disputed claims for certain Medicare payments be held by private insurance carriers, without further right of appeal." *Id.* at 189. The Court recognized that "due process demands impartiality on the part of those who function in judicial or quasi-judicial capacities, but held that, in the absence of "a showing of a conflict of interest or some other specific reason for disqualification," it would presume that hearing officers were unbiased. S. 971 would require that "neutrals" be unbiased (§ 583) and would allow judicial review of charges that they were not unbiased (§ 591, incorporating 9 U.S.C. § 10).

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[7] The full quotation in *Thomas* concerning review of constitutional error is: "Moreover, review of constitutional error is preserved, see *Walters* v. *National Assn. of Radiation Survivors*, [473 U.S.], at 311, n. 3; *Johnson* v. *Robison*, 415 U.S. 361, 367-368 (1974), and FIFRA, therefore, does not obstruct whatever judicial review might be required by due process." *Walters* merely refers to *Johnson v. Robison*, and *Johnson v. Robison* held that judicial review was not precluded by 38 U.S.C. § 211(a), which provides that "the decisions of the Administrator of any question of law or fact under any law administered by the Veterans' Administration providing benefits for veterans . . . shall be final and conclusive and no . . . court of the United States shall have power or jurisdiction to review any such decision. . . ." The Court based its conclusion on the fact that the statute appeared aimed at prohibiting challenges only of decisions of the Administrator *under* the law, not of decisions of Congress under the Constitution. This conclusion was supported by the fact to interpret the statute to preclude constitutional challenges might render the statute unconstitutional, and that "it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the [constitutional] question[s] may be avoided." 415 U.S. at 366-367. Furthermore, the Court requires "'clear and convincing' evidence of congressional intent . . . before a statute will be construed to restrict access to judicial review." *Id.* at 373-374.

Thus, when the Court in *Thomas* says that review of constitutional error is preserved under FIFRA, it is apparently only inferring this. Presumably, it would similarly infer it under S. 971 (and under 9 U.S.C. § 10, the standards of review of which S. 971 incorporates). However, to be certain of avoiding a constitutional problem in this connection, it might be advisable for Congress to state explicitly that S. 971 allows review of arbitrators' decisions on constitutional grounds.

Conclusion

It appears that S. 971 could withstand constitutional challenge under Article II, Article III, and the Due Process Clause. Under Article II, it does not appear that arbitrators would have to be appointed by the President, or that the use of private parties as arbitrators would be an impermissible delegation of governmental power. Under Article III, arbitrators would not have to be judges with life tenure subject to good behavior. Finally, under the Due Process Clause, S. 971's providing for unbiased arbitrators and for limited judicial review would appear adequate.

Henry Cohen
Legislative Attorney

THE RAND CORPORATION

**The Institute
For Civil Justice**

Deborah R. Hensler
Research Director

July 28, 1989

The Honorable Carl Levin, Chairman
Subcommittee on Oversight of
Government Management
Committee on Governmental Affairs
United States Senate
Washington DC 20510-6250

Dear Senator Levin:

Thank you for the opportunity to comment on S. 971, the Alternative Dispute Resolution Act of 1989. As you may know, the Institute for civil Justice, at The RAND Corporation, has conducted several empirical studies of the use of alternative dispute resolution procedures in state and federal courts. Unfortunately, we have not studied the use of ADR in administrative agencies. Hence, we do not feel we can comment on whether the bill will achieve its objectives of reducing time and cost spent on litigating agency matters.

However, based on our experience, we would recommend that the subcommittee consider incorporating in the bill language that would promote future empirical research on the consequences of using ADR in the agency setting. Specifically, in order to assess whether ADR meets its desired objectives, it is essential to be able to compare the outcomes of ADR with the outcomes of more traditional litigation practices. Very little of the current literature on ADR presents such comparative data. Typically readers are told that ADR achieves high settlement rates, but without information on the settlement patterns that prevailed in the absence of ADR, it is impossible to tell what the net effect of ADR has been. Our comparative research on court-annexed programs has frequently found that even when it achieves high settlement rates ADR does not appear to reduce trial rates or court costs although it may provide other important benefits to litigants.

The most rigorous approach to assessing the outcomes of ADR involves randomized experiments in which some cases are assigned to the new ADR program while others remain on the traditional processing track. By comparing the outcomes of both approaches, one can discern true differences between them. This research approach has been used in several studies of court-annexed ADR programs. However, randomized experimentation can be difficult to implement within real-life settings. In such cases, it is still extremely useful to compare outcomes of cases

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For Civil Justice

submitted to ADR with outcomes of similar cases processed prior to the introduction of ADR or with outcomes of similar cases processed in the traditional fashion in another jurisdiction or agency. The key is the ability to compare outcomes for ADR and more traditional litigation practices.

To conduct empirical analyses, the researcher needs data for both ADR and traditional cases related to: (1) disposition patterns; (2) time to disposition; (3) decision outcomes; (4) appeal rates from ADR; (5) administrative resources required to process cases; (6) costs to the private parties and (7) perceptions of the parties about the efficiency and equity of the process. Agencies can provide information on 1-5 if they regularly record it as part of an ongoing program monitoring process. Data for 6-7 can be obtained by surveying samples of disputants and their attorneys. Conducting such research not only requires the cooperation of administrative agencies but also requires funding from governmental sources.

I hope you find these comments helpful. I would be happy to discuss them further with your staff. I have also enclosed some examples of Institute for Civil Justice research reports on ADR that illustrate the research approaches described above.

Sincerely,

Deborah R. Hensler

DRH:ng

Copy: The Honorable William S. Cohen

U.S. MERIT SYSTEMS PROTECTION BOARD
Washington, D.C. 20419

The General Counsel

AUG 3 [illegible]

Dear Mr. Chairman:

This is in response to your letter seeking information about the use agencies have made of alternative dispute resolution procedures and inviting comments on S. 971, the Alternative Dispute Resolution Act of 1989. We appreciate the opportunity to relate our experiences with alternative dispute resolution procedures and your consideration of our views on S. 971.

The Merit Systems Protection Board has been using alternative dispute resolution techniques as a standard procedure in the adjudication of employee appeals challenging agency personnel actions for the last five years. The Board's alternative dispute resolution program was implemented pursuant to statutory authority and has had widespread acceptance by those litigating before us. We have found the procedures to be extremely effective in achieving faster processing of cases and just results for the parties. The settlement rates are quite dramatic. Between 1984 and 1988, the settlement rates of cases not dismissed have risen from 6 to 48 percent.

We attribute the high success rate of our dispute resolution efforts to a number of factors, including the statutory basis for our program; the requirement that--absent unusual circumstances--a prehearing conference be held in every case; the thorough and ongoing training of the administrative judges, who preside over the appeals, in dispute resolution techniques; and, the program's flexibility, which leaves to the administrative judge's discretion the alternative dispute resolution techniques to be applied in any particular case. We believe that the parties and public benefit because these procedures not only save time and money but also create a more amicable atmosphere.

The enclosed report sets forth more fully the Board's experience with alternative dispute resolution procedures

The Bicentennial of the U.S. Constitution 1787-1987 and summarizes the Board's current program. We have also included comments on the proposed legislation in light of our experience.

Again, we are pleased to have this opportunity to present our views on this subject. Please let us know if you need further information or if we can be of any assistance with regard to this or any other matters involving the Board.

Sincerely,

/O/

Mary L. Jennings
Acting General Counsel

Enclosure

The Honorable Carl Levin
Chairman
Subcommittee on Oversight of
Government Management
Committee on Governmental Affairs
United States Senate
Washington, DC 20510

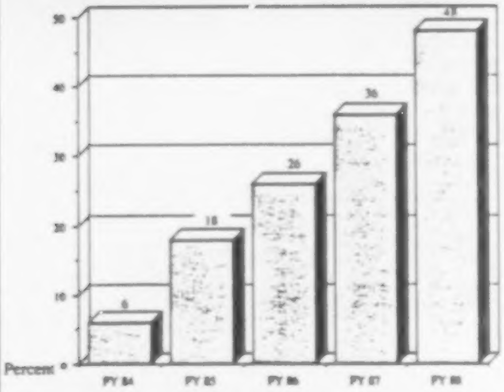
THE BOARD'S USE OF ALTERNATIVE DISPUTE RESOLUTION PROCEDURES

A. The Board's Alternative Dispute Resolution Program: Results of the Program

--Increased settlement rates

The Board began actively encouraging Board-wide use of alternative dispute resolution procedures in fiscal year 1987. Its settlement rate of cases not dismissed has climbed from 6 percent in 1984 to 48 percent in fiscal year 1988, an eightfold increase. The five-year trend in settlement rates of Board appeals is one indication of the efficacy of alternative dispute resolution procedures. The following table (Figure 6) shows the rate of settlement for the last five years. A Study of Cases Decided by the U.S. Merit Systems Protection Board in Fiscal Year 1988 ("Appeals Report").

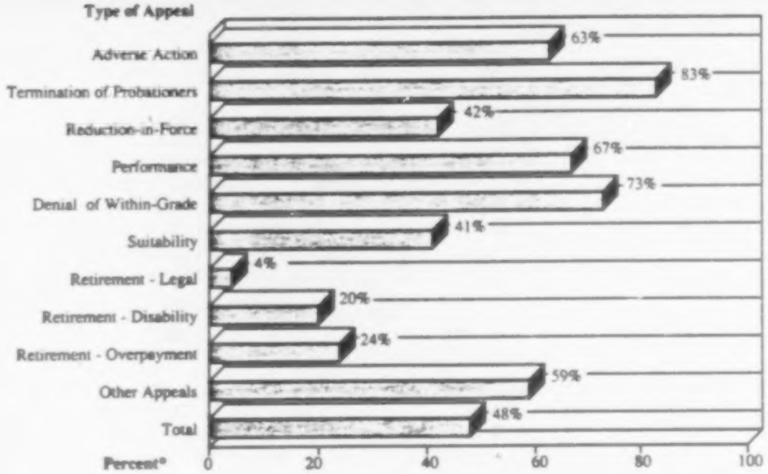
Figure 6. Five-Year Trend in Settlement Rates



* Percent of initial appeals not dismissed for lack of jurisdiction or timeliness (addendum cases are not included).

We also note that our experience has been that some types of initial appeals were settled at a higher rate than others. For example, adverse action cases, which constituted 52 percent of the Board's workload during FY 1988, were settled at a rate of 63 percent of the cases not dismissed. The following table (Figure 4) shows the settlement rates by type of initial appeal (for FY 1988). Appeals Report.

Figure 4. Settlement Rates by Type of Initial Appeal Decided in FY 1988



* Percent of initial appeals not dismissed for lack of jurisdiction or timeliness.

--Faster, less expensive case processing

The Board's reliance on alternative dispute resolution procedures has also allowed faster case processing. For fiscal year 1988, the average processing time for settled cases was 65 days, compared to 99 days for cases adjudicated on the merits.

Settlements are also generally less expensive than full adjudications. Often less time is expended and a variety of other expenses are reduced or eliminated. The Board estimates that during fiscal years 1987 through June 30, 1989, the settlement of cases saved the Board approximately $3,000,000. Litigation costs for the parties are also likely to be reduced.

--Equitable settlements

In the Board's experience, the dispute resolution program has promoted equitable and efficient settlements of litigation. Settlements obtained through such mechanisms have avoided often acrimonious litigation, and, by reaching a result both parties can live with, a settlement may well have fostered a better relationship after the appeal is over. Moreover, even where the dispute resolution process takes substantial time, the Board believes that consensual resolution of the issues often better serves the long-term interests of the parties--and the public.

There have been remarkably few problems in the Board's alternative dispute resolution program. Some petitions for review have been filed in cases where the initial appeal was settled. Such cases include allegations that the settlement process was unfair, that there were mutual mistakes, or that there was coercion by agency or Board officials. On review by the Board, almost all of these allegations have been found unsupported. Moreover, no court has found that settlement practices engaged in by our judges coerced the parties or were otherwise improper with respect to the rights of the parties.

--Related issues

There have been some new issues before the Board as a result of increased reliance on dispute resolution procedures. Settlement agreements that the administrative judge finds are legal and entered into voluntarily and that the parties have agreed to enter into the record are enforceable. A party seeking to enforce such an agreement can file a petition for enforcement with the Board. Issues presented to the Board in such cases include who bears the burden of proof and how the Board is to construe the agreement when the parties dispute the meaning. Some settlement agreements have also brought about new issues in attorney fee cases--for example, questions relating to identification of the prevailing party.

B. Background: The Board's Current Program

The Board's primary use of alternative dispute resolution procedures has been in the context of administrative adjudication of employee appeals challenging agency personnel actions. The Board initiated the program pursuant to the Civil Service Reform Act (CSRA), 5 U.S.C.

7701(h). In setting up its alternative dispute resolution program, the Board recognized that there are a number of professionally accepted methods for dispute resolution. Accordingly, the Board did not mandate any single, formal, regulated procedure for dispute resolution. Rather, it allowed its administrative judges--who sit as presiding officials in Board appeals--a great deal of flexibility in selecting dispute resolution procedures. In general, presiding officials have all powers necessary to conduct fair and impartial hearings and to avoid delay in the disposition of all proceedings.

Typically, after an appeal has been received, docketed, and entered into the Board's automated case tracking system, the regional office issues an order acknowledging receipt of the appeal and raising any questions of timeliness or jurisdiction. The appeal is then assigned to an administrative judge for processing. The agency is required to provide its file to the appellant and the administrative judge. The appellant and the agency then have the opportunity to present additional information for the administrative judge's consideration. The administrative judge may initiate attempts to settle an appeal informally at any time.

Under the Board's dispute resolution procedures, absent some unusual circumstance, at least one prehearing conference is required in every case that falls within the Board's jurisdiction and which is timely filed. The parties may agree to waive the prohibitions against ex parte communications during settlement discussions, and they may agree to any limits on the waiver. The Board requires that a representative of a party at a prehearing conference have authority to settle the case--or have immediate access to someone with that authority. Other than the required prehearing conference, the dispute resolution mechanisms used in any particular case are left to the discretion of the administrative judge. In handling cases, the Board's administrative judges employ an array of alternative dispute resolution techniques--including identification of issues, mediation, factfinding, stipulations, settlement negotiations, conciliation, facilitation, and, on occasion, mini-trials.

If the parties agree to settle their dispute, the settlement agreement is the final and binding resolution of the appeal, and the presiding official will dismiss the appeal with prejudice. If the parties offer the agreement for inclusion in the record, and if the presiding official approves the agreement, it will be made a part of the record, and the Board will retain jurisdiction to ensure compliance with the agreement. If the agreement is not entered into the record, the Board will not retain jurisdiction to ensure compliance.

The Board's settlement program reflects its commitment to experiment with different procedures to discover those most likely to result in fair and efficient resolution of disputes. To this end, the Board has made a continued effort to provide training for its administrative judges in a variety of mechanisms that might be used to achieve settlement between the parties. The Board's administrative judges have attended the National Judicial College, the American Law Institute, the Legal Education Institute, and other training programs on facets of alternative dispute resolution. The Board has also conducted a number of in-house conferences in which training in alternative dispute resolution mechanisms has been featured.

COMMENTS REGARDING S. 971

We have reviewed S. 971, which you sent to us, and we offer the following comments regarding those areas in which we have had some experience.

As noted above, the Board has statutory authority to use alternative dispute resolution procedures in adjudicating employee appeals and is at present making extensive use of such procedures in handling such cases. In establishing its alternative dispute resolution procedures, the Board began with the same basic assumptions as detailed in section 2 of the bill--in general, that constructive alternatives to litigation are effective and efficient government. In practice, the Board has found that the efficacy of dispute resolution mechanisms in employee appeals goes a long way in maintaining nonadversarial relations between the Federal manager and his or her employees.

To the extent that Section 3 encourages agencies to consider use of alternative dispute resolution measures in their administrative programs and to consult outside resources to determine the current best practices, we believe the bill is a constructive effort to expand use of what has been for us a useful tool in the adjudication process. It also appears that Section 3(a) is sufficiently flexible to allow agencies to adopt the particular alternative dispute resolution techniques best suited to the particular organizational structure, legislative and/or regulatory controls, and automated systems of the agency.

We believe, however, that each agency should be required to identify existing programs and determine whether they already utilize alternative dispute resolution mechanisms before it may promulgate a policy promoting alternative means of dispute resolution applying to "each administrative program" (section 3(a)). Because many agencies may already use these mechanisms in dealing with labor-related issues, this initial identification of existing processes appears to be a necessary step in avoiding an overlay of duplicative procedures. Section 2(7)--which requires that every agency "undertake a careful review of programs and disputes to ensure increased application of appropriate alternative means" (emphasis added)--does not directly meet this concern. Because of the problems that could be created by a patchwork of administrative processes, we believe it would be helpful to spell out the identification process more precisely.

We generally believe that Section 3(c), which requires training in alternative dispute resolution techniques, is an appropriate means to try to ensure that programs entered into are successful. As noted above, the Board has supported its commitment to use of alternative dispute resolution techniques in employee appeals with extensive training for those involved in implementing the program. Through such training, the Board has taken advantage of the variety of alternative dispute resolution techniques that find professional acceptance. Indeed, the Board has found that the administrative judges' familiarity with, and facility and skill in using, a number of techniques has been a key factor in the success of its program.

Section 4, amending 5 U.S.C. 556(c), establishes a number of administrative procedures. The main amendments require that (1) the presiding official "inform the parties as to the availability of one or more alternative means of dispute resolution and encourage use of such methods"; and (2) the presiding official require the attendance at any conference held . . . of at least one representative of each party who has authority to negotiate concerning resolution of issues in controversy." As set forth above, the Board's procedures in appeals cases require that, absent unusual circumstances, the parties participate in at least one prehearing conference and that the participants either have authority to settle the case or immediate access to someone who does. These measures have worked well in resolving litigation before the Board and would appear to be similarly useful in facilitating dispute resolution in other contexts.

Section 583 et seq. provides for the role of neutrals in dispute resolution proceedings; a neutral is defined in section 581(9) as one "who, with respect to an issue in controversy, serves as a conciliator, facilitator, mediator, factfinder, or arbitrator, or otherwise functions specifically to aid the parties in resolving the controversy." The Board has not required that a separate settlement judge be appointed in every case. The Board allows either party to request that a separate settlement judge be appointed, but such a request has been made infrequently. In establishing our alternative dispute resolution practices, the Board took into consideration that use of a separate settlement judge is not uniformly endorsed by the Federal courts. See D. Marie Provine, Settlement Strategies for Federal District Judges (Federal Judicial Center, 1986). In our experience, a separate settlement judge has not been necessary to effect fair settlements. As noted, no court has found the settlement practices engaged in by our administrative judges either coerced parties into settlements or were otherwise improper with respect to the rights of parties.

NAPA
National Academy of Public Administration
Chartered by Congress

August 4, 1989

The Honorable Carl Levin, Chairman
The Honorable William S. Cohen, Ranking Minority Member
Subcommittee on Oversight of Government
 Management
Senate Committee on Governmental Affairs
442 Hart Senate Office Building
Washington, D.C. 20510

Dear Senators Levin and Cohen:

Thank you for the opportunity to comment on S. 971, the Alternative Dispute Resolution Act of 1989. To prepare the following response, we convened a meeting on July 26, 1989, of a special panel of Academy Fellows with extensive experience in the fields of administrative procedure and dispute resolution (see enclosure). This response reflects the views of these individuals and not necessarily those of the Academy as an institution.

The Academy special panel believes that Alternative Dispute Resolution (ADR) has great promise as applied to disputes involving federal agencies. It therefore concludes that S. 971 establishes a principle that deserves strong support. The panel also noted that there are many forms of ADR, that the responsibilities of federal agencies differ sharply, and that the nature of the disputes they find themselves in differs greatly as well. On the basis of those considerations, the panel offered a number of observations which I present for your consideration.

1. First, each of the ADR techniques will work well in some circumstances and less well or not well at all in others. Despite the growing use of ADR at state levels, there is insufficient experience to tell us which techniques will be appropriate in which situations. We believe, therefore, that the bill should adopt a more explicitly experimental approach. By that we mean several things:

a. Instead of applying to the whole federal government the bill might, for some initial period, cover a representative subset of federal agencies which have proceedings indicative of various types of disputes (e.g., Social Security

Administration, Department of Veterans Affairs, economic and safety regulatory activities, industry licensing, etc.). This subset could be quite substantial and we do not mean to suggest that experimentation be small or timid in scope.

b. The bill now focuses largely on arbitration. That focus should be widened and sharpened. The bill should make clear, through a refined definition of other options and specifications of principles for their application, that a wide range of current and potential ADR techniques is available and their use encouraged.

c. After an initial period of perhaps two to five years, an intensive evaluation of the experience of agencies operating under the bill's provisions should be initiated. The evaluation should seek to identify the circumstances under which each of the ADR techniques have proved most (and least) appropriate and effective as applied to particular kinds of disputes. It should also probe the effectiveness of the dispute resolution substructure contemplated by the Act (e.g., the designation of "dispute resolution specialists," revision of current grant and contract agreements through ADR usage, etc.). The provisions concerning data-gathering by the Administrative Conference of the United States (ACUS) make a modest start in this direction but do not go nearly far enough and they do not authorize or assign responsibility for an intensive evaluation program.

d. After such a trial period, its evaluation and a conclusion that the experiment has been substantially successful, the whole government could then be encouraged to adopt ADR in the institutionalized manner contemplated by the bill. (Agencies, of course, are now free to adopt many ADR techniques if they so desire.) The expansion of structured ADR use in such a second stage should be guided and limited by the lessons learned in the first.

e. In the meanwhile, efforts should continue to reform or simplify current mechanisms for resolving disputes, such as improving and expediting formal and informal adjudicatory and rulemaking procedures. In particular, administrative law judges should be encouraged to use every reasonable means to lead parties to settlements. ADR's potential must not deter needed changes in dispute resolution procedures already in use. The Committee may wish to include in the preamble to the bill that its focus and facilitation of ADR is not meant to discourage streamlining and reform of basic claims and dispute processing procedures.

2. The limitation of $250,000 set for resolving claims through ADR, including binding arbitration, seems unduly constraining, especially in an explicitly experimental first stage. While the dollar limit may not be unrealistic for arbitration cases, such a limit is too low for other ADR methods. Perhaps a higher limit might be considered.

3. Four considerations argue that the bases for settlements using ADR should be more fully documented than they normally are among private disputants - during either an initial experimental period or a more widespread program of ADR stimulation: They are:

a. the precedential significance of dispute decisions involving the government and the need in such decisions to be able to demonstrate equity among claimants;

b. the need to provide assurance to the public and the executive and legislative branches of government that political and other extraneous considerations played no part in the ADR proceedings;

c. the right-to-know considerations (legal and otherwise) applicable to decisions by the federal government but not to private disputes; and

d. the need for careful evaluation of results at the conclusion of the experimental phase.

We would like to see the bill emphasize the importance of balancing those interests against ADR's normal need for informal and confidential proceedings, and we commend the provisions in the current version which show some recognition of that need (e.g. the criteria in Section 582(b) for assessing the appropriateness of ADR usage).

4. Finally, the provisions authorizing ACUS to administer direct payment of expenses to parties in particular cases seem to us inappropriate. They seem at odds with the nature and mission of ACUS, and may also conflict with any evaluative role that ACUS might be assigned. We believe that authorizing ACUS to make broad allotments of funds that agencies might draw upon would be more appropriate and that accountability for and audit of such expenses might itself be placed in some other unit, or perhaps with a contractor, since this represents a new and foreign activity not really consonant with ACUS' primary function and strengths.

The panel emphasized that these reservations were not taken to be criticisms of the underlying purpose of S. 971. The panel feels that experimentation with ADR in the structured manner contemplated by the Act should be carried out vigorously and by a fully representative range of federal entities. It believes that if the application of that ADR structure to the whole federal establishment follows such a start, its use and contribution is likely to be more discriminating, reliable, and effective.

Once again, we thank you for the opportunity to consider the bill. The Academy welcomes any questions you may have, and we stand ready to provide further assistance to your Subcommittee, either during the legislative process or in the evaluation stage.

Sincerely,

Ray Kline

Ray Kline
President

Enclosure

National Academy of Public Administration
Panel to Discuss
Alternative Dispute Resolution Act of 1989

July 26, 1989

Mr. Peter L. Szanton, Chair
President, Szanton Associates

Former Associate Director, Office of Management and Budget; founding President of the New York City-RAND Institute; co-author, Dispute Resolution in America: Processes in Evolution; has evaluated alternative dispute resolution in the private sector and on the state level.

Mr. Murray Comarow
Distinguished Adjunct Professor in Residence, School of Public Affairs
The American University

Former Executive Director, President's Advisory Council on Executive Organization; Executive Director, President's Commission on Postal Reorganization; Senior Assistant Postmaster General; Executive Director Federal Power Commission; Assistant General Counsel, Office of the Secretary of the Air Force.

Mr. William R. Drake*
Vice President, National Institute for Dispute Resolution

Helped design and create five state offices of mediation and eight state court arbitration programs; assists federal regulatory negotiation experiments; Faculty, Institute for Court Management and National Judicial College; former Program Director and Deputy Director of Member Services, National League of Cities; Program Director, U.S. Conference of Mayors.

Mr. Max D. Paglin
Executive Director, Golden Jubilee Commission on Telecommunications

Former Assistant General Counsel (Litigation), General Counsel, and Executive Director, Federal Communication Commission; Member and Chairman of Licensing Boards, Atomic Energy Commission/Nuclear Regulatory Commission; Vice Chairman, Government Member, Public Member, and Senior Fellow, Administrative Conference of the United States.

Mr. Daniel L. Skoler
Director, Division of Continuing Education and Training
Federal Judicial Center

Former Deputy Assistant Commissioner for Trademarks, Patent and Trademark Office; Chairman, Trademark Trial and Appeal Board, Patent and Trademark Office; Deputy Associate Commissioner for Hearings and Appeals, Social Security Administration; Executive Director, National Council of Juvenile and Family Court Judges.

Mr. Joseph C. Swidler
Swidler and Berlin, Chartered

Former General Counsel, Secretary, and Chairman of the Retirement System, Tennessee Valley Authority; Chairman, Federal Power Commission; Chairman, Public Service Commission, State of New York; Director, Institute for Public Policy Alternatives, State University of New York.

*Denotes Non-Academy Fellow

DEPARTMENT OF THE ARMY
OFFICE OF THE CHIEF OF ENGINEERS
WASHINGTON, D.C. 20314-1000

REPLY TO
ATTENTION OF:

11 AUG 1989

Honorable Carl Levin, Chairman
Subcommittee on Oversight of Government
Management
442 Hart Senate Office Building
Washington, DC 20510

Dear Senator Levin:

This is in response to your request that the U.S. Army Corps of Engineers provide you with information on the Corps use of Alternative Dispute Resolution (ADR) methods. We are pleased to share our ADR experience with you, as the Corps of Engineers has been recognized as a leader in promoting ADR in the Federal government. You had also requested comments on S.971, a bill to "authorize and encourage Federal agencies to use mediation, conciliation, arbitration, and other techniques for the prompt and informal resolution of disputes, and for other purposes." The Department of the Army will express the views of the Administration on the proposed legislation in a separate letter.

The Corps of Engineers has experience in using ADR to resolve disputes in many areas, though our most extensive experience is in contracts. The Corps has pioneered the use of the mini-trial in resolving contract disputes, employing the procedure seven times since 1984. These disputes represented more than $190 million in claims, and were resolved for $29.7 million. The Corps also used another ADR method, non-binding arbitration, to resolve contract disputes. Our experience with ADR extends beyond contract disputes to our environmental programs, operations and maintenance activities, and our permitting responsibilities, as well.

To cite some recent examples, the Corps of Engineers has used ADR methods in the following instances:

- o A mini-trial successfully led to settlement of the cost allocation percentages for cleanup responsibility at a Superfund site. The Corps represented the Department of Defense which was named as a potentially responsible party.
- o Mediation was also used to reach consensus among diverse groups in support of regional General Permits for activities subject to Corps approval under Section 404 of the Clean Water Act.

- The Corps has undertaken two other ADR methods in construction contract administration which are designed to resolve disputes. The Corps is using disputes review panels established at the outset of major construction projects, as a means of getting an early non-binding expert opinion in hopes of resolving disputes before they become claims. We are also experimenting with the "partnering" program where a coordinated effort is made by the government and the contractor before construction begins to establish a cooperative spirit of communication and collaborative problem solving. Once again, the goal is to resolve potential disputes early and, thus, avoid costly claims.

In addition, for the last several years, the local cooperation agreements we have executed with non-Federal interests for construction of cost-shared civil works projects have reflected our committment to ADR. Almost without exception each of the agreements has contained the following clause:

> "Before any party to this Agreement may bring suit in any court concerning an issue relating to this Agreement, such party must first seek in good faith to resolve the issue through negotiation or other forms of nonbinding alternative dispute resolution mutually acceptable to the parties."

In our view, this clause and the concept of ADR are instrumental in advancing the principles of partnership developed in the Water Resources Development Act of 1986. Although we have not had to resort to any specific nonbinding ADR to this point, I believe the mere existence of the clause has resulted in encouraging the parties to negotiate their differences in a serious manner rather than threatening litigation. The availability of ADR provides both the Government and non-Federal project sponsors maximum flexibility for cost-effective conflict resolution.

The Corps of Engineers believes in the benefits that ADR offers to the efficient carrying out of government functions. To achieve the maximum use of ADR methods, the Corps has undertaken a formal ADR program that includes ADR training and how-to publications, technical assistance to our Division and District offices, and research and evaluation of cases. Our hope is that ADR will become a part of every Corps manager's tool kit for resolving disputes and making decisions. We believe that our managers are the best qualified people to make technical decisions and ADR allows them to make difficult decisions cooperatively, rather than turning the decision over to a third party such as a judge.

I have enclosed with this letter a paper which will be presented by the Corps Chief Counsel, Lester Edelman, at the American Bar Association meeting this month. This paper presents a detailed summary of the Corps ADR program and our ADR experience. I recommend it to you for details of the items mentioned in this letter.

Thank you for your inquiry.

Sincerely,

H. J. Hatch
Lieutenant General, U.S. Army
Chief of Engineers

Enclosure

cc:
Honorable William S. Cohen
Ranking Republican

UNITED STATES COURT OF APPEALS
WASHINGTON, D. C. 20001

PATRICIA M. WALD
CHIEF JUDGE

'89 SEP 25 AM 10 17

September 21, 1989

Honorable Carl Levin
Chairman
Subcommittee on Oversight of Government Operations
Committee on Governmental Affairs
United States Senate
SH-442 Hart Senate Office Building
Washington, D.C. 20510

Dear Mr. Chairman:

I understand that your Subcommittee is holding hearings this week to examine federal agencies' use of alternative means of dispute resolution. The hearings focus in particular on S. 971, the Alternative Dispute Resolution Act. At the Subcommittee's request, I would like to reflect my views based on the D.C. Circuit's experience with a Court-annexed mediation program. I believe that ADR can be a useful adjunct to conventional litigation with significant benefit to federal agencies and other litigants and, ultimately, the courts.

The U.S. Court of Appeals for the D.C. Circuit, the U.S. District Court for the District of Columbia, and the Administrative Conference of the United States are involved in a unique, coordinated program to make ADR options available throughout the D.C. Circuit at both appellate and trial levels. To our knowledge, there is no other Circuit-wide program of this type in operation in the country. These undertakings will, we hope, help us to offer disputants a variety of ways to resolve conflicts promptly, minimize acrimony, and reduce the cost of dispute handling.

The U.S. Court of Appeals' experimental mediation program requires that all cases be carefully screened and utilizes highly experienced mediators. The program has the strong support of the judges on the Court of Appeals. Still needed, however, are vital links with key federal agencies to ensure that high-level officials are aware of the program, the opportunities it offers litigants, and the goals of the Circuit in operating the program.

The District Court program will make available to judges and disputants a variety of ADR mechanisms. Initially, two options will be available: mediation and early neutral evaluation. An ADR expert is working with all participating judges on an individual basis, reviewing his or her caseload and suggesting specific ADR options for individual cases. Cases selected for ADR will be referred to staff in the Circuit Executive's Office who will assign a mediator or evaluator, as appropriate.

Generally I believe that enactment of S. 971 could reinforce ADR programs like those operating in the D.C. Circuit and enhance their chances for success. The caseloads of our two courts often involve administrative agencies as parties and affect crucial agency interests. To the extent that federal agencies are aware of ADR methods and positioned to take advantage of them, the D.C. Circuit's programs should benefit immensely.

The provision of S. 971 mandating appointment of agency dispute resolution officers would get word to agencies about programs like the D.C. Circuit's and would establish a knowledgeable, in-house representative to deal with practical concerns in individual cases. The sections calling for training and development of dispute resolution strategies also may help such programs obtain a favorable reception among potential agency users. This could increase use of our mediation and related processes; also, if agency officials participate and are satisfied with the results, they become proponents for these methods within their agencies or with other agencies.

The section that sets forth standards for confidentiality in settlement discussions also reflects a useful approach. While the D.C. Circuit order establishing the Appellate Mediation Program already provides for confidentiality, establishment of a reliable, balanced statutory standard will give added assurances for participation in ADR discussions by agencies and those who litigate against them.

A potentially significant aspect of the bill is the role assigned the Administrative Conference. As I mentioned, the D.C. Circuit's partnership with the Conference is valuable in helping to obtain ADR training and access to agencies. Not only is the Conference strategically positioned to increase support throughout government for these initiatives, but it is also uniquely qualified to prepare and distribute information about program results. Because of the Conference's work in ADR, it already has credibility in the field, and its research and publications are known to agencies and courts throughout the country. The expanded role of the Conference which is contemplated by the bill would make the organization an even more useful resource for federal, state and local judges, administrative law judges, and agency administrators.

I hope these views will be useful to the Subcommittee; should you have any questions, I, or Circuit Executive Linda Finkelstein, would be pleased to discuss them.

Sincerely,

Patricia M. Wald
Chief Judge

JOHN GLENN, OHIO, CHAIRMAN

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United States Senate
COMMITTEE ON
GOVERNMENTAL AFFAIRS
WASHINGTON, DC 20510-6250

October 2, 1989

The Honorable Richard Thornburgh
Attorney General of the United States
U.S. Department of Justice
Tenth Street and Constitution Avenue, N.W.
Washington, D.C. 20530

Dear Mr. Attorney General:

On September 19, 1989, the Senate Subcommittee on Oversight of Government Management held a hearing on S. 971, the Administrative Dispute Resolution Act of 1989. The testimony given by William Barr, Assistant Attorney General, Office of Legal Counsel, was informative and useful.

During the hearing, Mr. Barr indicated that the Justice Department would provide data on the savings, in time and costs, realized as a result of the experimental mandatory arbitration program conducted by the Federal Judicial Center. We look forward to receiving that information.

In addition, the Subcommittee would appreciate answers to the following questions.

(1) Is the arbitration used in your agency's mandatory arbitration program binding arbitration? If so, under what authority was this program developed? If this program utilizes binding arbitration, how has the Department designed the program to meet constitutional tests? What types of cases have you found suitable for this program?

(2) According to Mr. Barr's testimony, the Department of Justice is now using mini-trials as an alternative to litigation. What factors are Justice Department attorneys required to consider and what procedures are they required to follow when deciding whether to pursue mini-trial procedures? What types of cases are most suitable for this method? Please provide the Subcommittee with any information you may have available on the time and cost savings realized from using the mini-trial procedure.

(3) At the hearing, Mr. Barr also indicated that all arbitration programs currently authorized and used by federal agencies except, perhaps, the FLRA, provide for some type of agency review of the arbitral decision and, therefore, are not technically binding. Does that remain the conclusion of the Justice Department?

Thank you for your assistance. We'd appreciate your response to this request by October 16, 1989. If your staff has any questions regarding this matter please have them contact Kay DeKuiper or Melinda Loftin of the Subcommittee staff at 224-3682.

Sincerely,

Carl Levin
Chairman

William S. Cohen
Ranking Minority Member

Subcommittee on Oversight of Government Management

CL:WSC:kd

U.S. Department of Justice
Office of Legal Counsel

Office of the
Assistant Attorney General

Washington, D.C. 20530

November 8, 1989

The Honorable Carl Levin
The Honorable William Cohen
U.S. Senate
Committee on Governmental Affairs
Subcommittee on Oversight of Governmental Management
442 Hart Senate Office Building
Washington, D.C. 20510-6260

Dear Senators Levin and Cohen:

I am pleased to transmit the following response to your letter of October 2, 1989, following up on my testimony about alternative dispute resolution. Your letter asked the Department to provide information for use in the consideration of S. 971, the Administrative Dispute Resolution Act of 1989.

(1) In the experimental mandatory arbitration program, cases are submitted to arbitration, subject to a later trial de novo at the request of either party. The arbitrations are thus a method for helping parties achieve settlements and are not binding.

Each judicial district having such a program has created somewhat different rules, but the policy of the Department regarding all so-called "court-annexed arbitration" programs is set out at 28 C.F.R. § 50.20 (1988). I am attaching a copy of that policy.

As you will see, the Department "recognizes and supports the general goals of court-annexed arbitrations, which are to reduce the time and expenses required to dispose of civil litigation." § 50.20(a)(1). On the basis of our experience, the Department generally endorses the inclusion in the program of cases seeking only money damages of less than $100,000 and arising under the Federal Tort Claims Act, the Longshoreman's and Harbor Worker's Compensation Act, or the Miller Act. § 50.20(b)(2). Our policy provides that arbitration under these experimental programs is not suitable for "cases that may involve complex issues of liability or other unsettled legal questions," § 50.20(a)(2), cases under the Constitution or a common law theory "against an employee of the United States in his personal capacity for actions within the scope of his employment which are alleged to have caused injury or loss of property," § 50.20(d)(2), and cases for declaratory or injunctive relief, § 50.20(d)(3).

The policy also deals with the circumstances in which we will seek a trial de novo. For example, we seek a trial de novo when "[s]ettlement of the case on the basis of the amount awarded would not be in the best interests of the United States." § 50.20(d)(1)(i).

The Department's experience with court-annexed arbitration programs has varied. Our contact with these programs comes principally by way of the United States Attorneys' offices. I am informed that some of the personnel in those offices have found that arbitration can promote settlement of simple cases; others have found that arbitration adds another step to litigation without clear benefits in promoting settlements. Our position has been that, when such programs are tried, they should continue to be designed and implemented on a district-by-district basis. See 28 U.S.C. §§ 651-658.

We have also located some publications containing statistics about the operation of court-annexed arbitration. The Federal Judicial Center, under whose auspices the experimental program is conducted, published in 1983 a revised version of Evaluation of Court-Annexed Arbitration in Three Federal District Courts, by E. Allen Lind and John E. Shapard. That volume collected data on court-annexed arbitration in the Eastern District of Pennsylvania, the District of Connecticut, and the Northern District of California. Furthermore, in 1988 and 1989, the Federal Judicial Center published a series of reports on court-annexed arbitration in 10 federal district courts.[1]

(2) In my testimony, I referred to the Department's use of mini-trials as a mechanism for alternative dispute resolution. In mini-trials, both sides to a litigation use flexible, expedited procedures to present summary versions of their cases, and the principals of the parties then meet to discuss settlement.

As I stated in my testimony, the Department has issued a policy statement on the use of mini-trials. This policy statement was prepared by the Commercial Litigation Branch of the Civil Division, which has engaged in mini-trials in some of its cases. The policy, which we attach, sets out the procedures for agreeing to mini-trials.

The Department believes that mini-trials may be useful in cases where, as far as it is possible to predict, the issues are factual but do not involve questions of credibility. Mini-trials are not suitable in cases that will establish precedent. Policy, III.

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[1] This response (1) also answers the request for more information made at the hearing.

The policy states that if the non-government party asks for a mini-trial, the government trial attorney should submit that request, along with his or her recommendation and that of the interested agency, to his or her supervisor. On the government's side, the trial attorney has the initial responsibility for identifying cases in which a mini-trial may be productive. The trial attorney, upon identifying such a case, is to obtain the recommendation of the interested agency and the approval of his or her supervisor, before approaching the other party. Id. at IV.

Under our policy, a mini-trial takes place only if the two sides enter into a written agreement governing the procedure. The agreement sets time limits for each part of the procedure, stipulates that the procedure is non-binding, and calls for the parties to seek suspension of the proceedings in the pending litigation while the mini-trial procedure goes forward. Id. at VI.

The mini-trial itself ordinarily is to take no more than a day. Id. at VII.e. The proceedings are not transcribed or recorded. Id. Typically, the parties select a neutral adviser to act as a "judge," informing the parties about the probable outcome of the case if it were to go to trial. Id. at VII.f. Either party may terminate the mini-trial proceedings at any time. Id. at VII.i.

Last year, testifying on ADR before the Subcommittee on Administrative Law and Governmental Relations of the House Committee on the Judiciary, Deputy Assistant Attorney General Stuart E. Schiffer stated: "We have been actively seeking additional cases which would be suitable for mini-trials. For reasons that are unclear, we have not been approached by members of the private bar with suggested cases despite the wide publicity accorded our policy statement. In other cases in which we have suggested the use of the technique, we have not obtained the agreement of counsel for the private party." Alternative Dispute Resolution Use by Federal Agencies: Hearing Before the Subcommittee on Administrative Law and Governmental Relations of the House Committee on the Judiciary, 100th Cong., 2d Sess. 48 (1988). We believe that these facts have not changed. Furthermore, we are not aware of any statistical data on time or money saved as a result of those mini-trials that have taken place.

(3) Of the arbitration programs currently used in the federal government, the results of the arbitral proceedings, in our view, cannot properly be characterized as binding on the

government as a matter of statute, except possibly for arbitration of labor disputes.

In the area of federal labor disputes, 5 U.S.C. § 7121(b) provides that if grievances are not resolved under negotiated grievance procedures, they "shall be subject to binding arbitration which may be invoked by either the exclusive representative [of the employees] or the agency." However, even this "binding" arbitration is subject to a measure of agency review. Either party to the arbitration may ask the Federal Labor Relations Authority to review the arbitral award, and that review extends not only to the "grounds similar to those applied by Federal courts in private sector labor-management relations" but also to the question whether the award "is contrary to any law, rule, or regulation." 5 U.S.C. § 7122(a). Although this scope is narrower than in the typical review by agencies of decisions by administrative law judges, it is far broader than in judicial review of arbitral awards.

At the hearing before the Subcommittee, there was a discussion of the Environmental Protection Agency's regulations for arbitration of Superfund cases where the costs at issue are less than $500,000. These regulations, issued under 42 U.S.C. § 9622(h)(2), provide (as does the statute) for notice and comment on any proposed arbitral decision; EPA may overturn the decision if the comments "disclose . . . facts or considerations which indicate the proposed decision is inappropriate, improper or inadequate." 54 Fed. Reg. 23186 (1989) (to be codified at 40 C.F.R. § 304.33(e)(1)(iii)). Furthermore, in cases where no public comments are filed, the statute itself does not expressly forbid agency review of arbitral awards. The statute thus leaves to the agency a choice about how its regulations deal with such review. But although S. 971 would allow an agency to choose whether to arbitrate a particular dispute, the statute would mandate that, if arbitration were used, the arbitration would be binding. See § 590(b). In this respect, S. 971 would go farther than the Superfund amendments under which EPA issued its regulations.

Arbitrations under the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. § 136a(c)(1)(D)(ii), fix the amount that one private party owes another for use of data about a pesticide. Although the entitlement to compensation "bears many of the characteristics of a 'public' right" under federal law and so the amount of compensation may be determined outside an Article III court, see Thomas v. Union Carbide Agricultural Products Co., 473 U.S. 568, 589 (1985), the arbitral award will not direct the government to do anything or make any payment and cannot fairly be characterized as binding the government.[2]

Under regulations issued by the Secretary of Health and Human Services, disputed claims against Part B Medicare funds are resolved through a binding hearing procedure conducted by the private insurance carriers that administer the program under contract with the Secretary. See Schweiker v. McClure, 456 U.S. 188 (1982). The statute, while favoring contracts under which private carriers make such decisions, does not foreclose the Secretary, upon giving adequate reasons, from taking back the power to administer the program and setting up his own decision-making procedures. 42 U.S.C. § 1395u. Once again, S. 971 goes farther, by directing that arbitration, if used at all, will be binding. § 590(b).

Finally, as explained in my testimony, a number of other statutes have been cited in support of S. 971 but do not unambiguously call for binding arbitration. To our knowledge, binding arbitration does not take place in the execution of these laws. Arbitration under the National Flood Insurance Program, by the express terms of the statute, is non-binding. 42 U.S.C. § 4083. The two statutory provisions on admiralty claims do not state that arbitration of the claims will be binding. 46 U.S.C. §§ 749, 786. Arbitration of disputes about investment guarantees under the foreign assistance program is to be "on such terms and conditions as the President may direct." 22 U.S.C. §2395(i).

I hope that this information is useful to the Subcommittee. Of course, if you have any additional questions, I would be happy to respond to them.

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[2] Cf., e.g., Shearson/American Express, Inc. v. McMahon, 107 S. Ct. 2332 (1987)(under agreement made before controversy arose, Court upholds arbitration of claims between private parties under Securities Exchange Act of 1934 and Racketeer Influenced and Corrupt Organizations Act); Rodriguez De Quijas v. Shearson/ American Express, Inc., 109 S. Ct. 1917 (1989)(same, under Securities Act of 1933); Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, 473 U.S. 614 (1985)(arbitration of antitrust claims arising from international transaction).

The Office of Management and Budget advises that, from the standpoint of the Administration's program, there is no objection to the presentation of this report for the consideration of the Subcommittee.

Sincerely yours,

William P. Barr
Assistant Attorney General
Office of Legal Counsel

counsel conducting litigation pursuant to agreement with or authority delegated by the Attorney General, without the prior written approval of the Assistant Attorney General having ultimate supervisory power over the action in which recusal or disqualification is being considered.

(b) Prior to seeking such approval, Justice Department lawyer(s) handling the litigation shall timely seek the recommendations of the U.S. Attorney for the district in which the matter is pending, and the views of the client agencies, if any. Similarly, if agency attorneys are primarily handling any such suit, they shall seek the recommendations of the U.S. Attorney and provide them to the Department of Justice with the request for approval. In actions where the United States Attorneys are primarily handling the litigation in question, they shall seek the recommendation of the client agencies, if any, for submission to the Assistant Attorney General.

(c) In the event that the conduct and pace of the litigation does not allow sufficient time to seek the prior written approval by the Assistant Attorney General, prior oral authorization shall be sought and a written record fully reflecting that authorization shall be subsequently prepared and submitted to the Assistant Attorney General.

(d) Assistant Attorneys General may delegate the authority to approve or deny requests made pursuant to this section, but only to Deputy Assistant Attorneys General or an equivalent position.

(e) This policy statement does not create or enlarge any legal obligations upon the Department of Justice in civil or criminal litigation, and it is not intended to create any private rights enforceable by private parties in litigation with the United States.

[Order No. 977-82, 47 FR 22094, May 21, 1982]

§ 50.20 Participation by the United States in court-annexed arbitration.

(a) *Considerations affecting participation in arbitration.* (1) The Department recognizes and supports the general goals of court-annexed arbitrations, which are to reduce the time and expenses required to dispose of civil litigation. Experimentations with such procedures in appropriate cases can offer both the courts and litigants an opportunity to determine the effectiveness of arbitration as an alternative to traditional civil litigation.

(2) An arbitration system, however, is best suited for the resolution of relatively simple factual issues, not for trying cases that may involve complex issues of liability or other unsettled legal questions. To expand an arbitration system beyond the types of cases for which it is best suited and most competent would risk not only a decrease in the quality of justice available to the parties but unnecessarily higher costs as well.

(3) In particular, litigation involving the United States raises special concerns with respect to court-annexed arbitration programs. A mandatory arbitration program potentially implicates the principles of separation of powers, sovereign immunity, and the Attorney General's control over the process of settling litigation.

(b) *General rule consenting to arbitration consistent with the department's regulations.* (1) Subject to the considerations set forth in the following paragraphs and the restrictions set forth in paragraphs (c) and (d), in a case assigned to arbitration or mediation under a local district court rule, the Department of Justice agrees to participate in the arbitration process under the local rule. The attorney for the government responsible for the case should take any appropriate steps in conducting the case to protect the interests of the United States.

(2) Based upon its experience under arbitration programs to date, and the purposes and limitations of court-annexed arbitration, the Department generally endorses inclusion in a district's court-annexed arbitration program of civil actions—

(i) In which the United States or a Department, agency, or official of the United States is a party, and which seek only money damages in an amount not in excess of $100,000, exclusive of interest and costs; and

(ii) Which are brought (A) under the Federal Tort Claims Act, 28 U.S.C.

1346(b), 2671 *et seq.*, or (B) under the Longshoreman's and Harbor Worker's Compensation Act, 33 U.S.C. 905, or (C) under the Miller Act, 40 U.S.C. 270(b).

(3) In any other case in which settlement authority has been delegated to the U.S. Attorney under the regulations of the Department and the directives of the applicable litigation division and none of the exceptions to such delegation apply, the U.S. Attorney for the district, if he concludes that a settlement of the case upon the terms of the arbitration award would be appropriate, may proceed to settle the case accordingly.

(4) Cases other than those described in paragraph (2) that are not within the delegated settlement authority of the U.S. Attorney for the district ordinarily are not appropriate for an arbitration process because the Department generally will not be able to act favorably or negatively in a short period of time upon a settlement of the case in accordance with the arbitration award. Therefore, this will result in a demand for trial de novo in a substantial proportion of such cases to preserve the interests of the United States.

(5) The Department recommends that any district court's arbitration rule include a provision exempting any case from arbitration, sua sponte or on motion of a party, in which the objectives of arbitration would not appear to be realized, because the case involves complex or novel legal issues, or because legal issues predominate over factual issues, or for other good cause.

(c) *Objection to the imposition of penalties or sanctions against the United States for demanding trial de novo.* (1) Under the principle of sovereign immunity, the United States cannot be held liable for costs or sanctions in litigation in the absence of a statutory provision waiving its immunity. In view of the statutory limitations on the costs payable by the United States (28 U.S.C. 2412(a), 2412(b), and 1920), the Department does not consent to provisions in any district's arbitration program providing for the United States or the Department, agency, or official named as a party to the action to pay any sanction for demanding a trial de novo—either as a deposit in advance or as a penalty imposed after the fact—which is based on the arbitrators' fees, the opposing party's attorneys' fees, or any other costs not authorized by statute to be awarded against the United States. This objection applies whether the penalty or sanction is required to be paid to the opposing party, to the clerk of the court, or to the Treasury of the United States.

(2) In any case involving the United States that is designated for arbitration under a program pursuant to which such a penalty or sanction might be imposed against the United States, its officers or agents, the attorney for the government is instructed to take appropriate steps, by motion, notice of objection, or otherwise, to apprise the court of the objection of the United States to the imposition of such a penalty or sanction.

(3) Should such a penalty or sanction actually be required of or imposed on the United States, its officers or agents, the attorney for the government is instructed to:

(i) Advise the appropriate Assistant Attorney General of this development promptly in writing;

(ii) Seek appropriate relief from the district court; and

(iii) If necessary, seek authority for filing an appeal or petition for mandamus.

The Solicitor General, the Assistant Attorneys General, and the U.S. Attorneys are instructed to take all appropriate steps to resist the imposition of such penalties or sanctions against the United States.

(d) *Additional restrictions.* (1) The Assistant Attorneys General, the U.S. Attorneys, and their delegates, have no authority to settle or compromise the interests of the United States in a case pursuant to an arbitration process in any respect that is inconsistent with the limitations upon the delegation of settlement authority under the Department's regulations and the directives of the litigation divisions. See 28 CFR Part 0, Subpart Y and Appendix to Subpart Y. The attorney for the government shall demand trial de novo in any case in which:

(i) Settlement of the case on the basis of the amount awarded would not be in the best interests of the United States;

(ii) Approval of a proposed settlement under the Department's regulations in accordance with the arbitration award cannot be obtained within the period allowed by the local rule for rejection of the award; or

(iii) The client agency opposes settlement of the case upon the terms of the settlement award, unless the appropriate official of the Department approves a settlement of the case in accordance with the delegation of settlement authority under the Department's regulations.

(2) Cases sounding in tort and arising under the Constitution of the United States or under a common law theory filed against an employee of the United States in his personal capacity for actions within the scope of his employment which are alleged to have caused injury or loss of property or personal injury or death are not appropriate for arbitration.

(3) Cases for injunctive or declaratory relief are not appropriate for arbitration.

(4) The Department reserves the right to seek any appropriate relief to which its client is entitled, including injunctive relief or a ruling on motions for judgment on the pleadings, for summary judgment, or for qualified immunity, or on issues of discovery, before proceeding with the arbitration process.

(5) In view of the provisions of the Federal Rules of Evidence with respect to settlement negotiations, the Department objects to the introduction of the arbitration process or the arbitration award in evidence in any proceeding in which the award has been rejected and the case is tried de novo.

(6) The Department's consent for participation in an arbitration program is not a waiver of sovereign immunity or other defenses of the United States except as expressly stated; nor is it intended to affect jurisdictional limitations (*e.g.*, the Tucker Act).

(e) *Notification of new or revised arbitration rules.* The U.S. Attorney in a district which is considering the adoption of or has adopted a program of court-annexed arbitration including cases involving the United States shall:

(1) Advise the district court of the provisions of this section and the limitations on the delegation of settlement authority to the United States Attorney pursuant to the Department's regulations and the directives of the litigation divisions; and

(2) Forward to the Executive Office for United States Attorneys a notice that such a program is under consideration or has been adopted, or is being revised, together with a copy of the rules or proposed rules, if available, and a recommendation as to whether United States participation in the program as proposed, adopted, or revised, would be advisable, in whole or in part.

[Order No. 1109-85, 50 FR 40524, Oct. 4, 1985]

§ 50.21 Procedures governing the destruction of contraband drug evidence in the custody of Federal law enforcement authorities.

(a) *General.* The procedures set forth below are intended as a statement of policy of the Department of Justice and will be applied by the Department in exercising its responsibilities under Federal law relating to the destruction of seized contraband drugs.

(b) *Purpose.* This policy implements the authority of the Attorney General under Title I, section 1006(c)(3) of the Anti-Drug Abuse Act of 1986, Pub. L. 99-570 which is codified at 21 U.S.C. 881(f)(2), to direct the destruction, as necessary, of Schedule I and II contraband substances.

(c) *Policy.* This regulation is intended to prevent the warehousing of large quantities of seized contraband drugs which are unnecessary for due process in criminal cases. Such stockpiling of contraband drugs presents inordinate security and storage problems which create additional economic burdens on limited law enforcement resources of the United States.

JUN 1 9 1986

COMMERCIAL LITIGATION BRANCH POLICY CONCERNING THE USE OF MINI-TRIALS

I.

STATEMENT OF POLICY

It is the policy of the Commercial Litigation Branch of the Department of Justice to consider carefully and, where appropriate, implement methods for resolving disputes that are alternatives to judicial proceedings. In furtherance of that policy, the Branch will participate in mini-trials as a form of alternate dispute resolution. Branch attorneys are encouraged to assess cases assigned to them for the potential for resolution by mini-trial and are requested to forward requests for mini-trials from opposing counsel to obtain a decision by an appropriate Department of Justice official. Branch attorneys should make it clear to opposing counsel, however, that the Branch will not participate in a mini-trial unless appropriate Departmental officials, in the exercise of their discretion, determine that participation is appropriate and in the best interests of the Government.

II.

GENERAL

1. Definition. A mini-trial is a voluntary, expedited, nonjudicial procedure through which management officials for each party meet to resolve disputes.

2. Purpose. A mini-trial is intended to reduce the cost, disruption and delay associated with litigation.

3. Description. A mini-trial is not actually a trial; rather, it is a process designed to facilitate settlement by educating the parties' principals regarding the strengths and weaknesses of the positions of both parties. The process combines the salutary aspects of negotiation and litigation, using flexible procedures designed to meet the needs of each individual case.

4. Attributes. The following are characteristic of all mini-trials in which the Department will participate:

a. Involvement of Principals: Management officials with settlement authority (or with the authority to make a final recommendation as to settlement) for both parties participate directly.

b. Expedited Time Period: The time period allowed for a mini-trial is brief and deadlines are expedited.

c. Non-binding Discussions By Principals: At the close of the presentation, the principals meet by themselves to attempt to resolve the dispute. These discussions are not binding and may not be used by either party in any subsequent proceedings.

d. Informality: All proceedings are informal.

In addition, where appropriate, the parties may select a neutral advisor to provide advice to the management officials involved in the mini-trial.

III.

CRITERIA FOR SELECTING CASES

Cases likely to be governed by clear legal precedent are not good candidates for resolution by mini-trial. Cases which involve factual disputes, which do not depend upon the credibility of the witnesses, are preferred. Cases which are expected to establish important legal precedent and those which are clearly without merit do not lend themselves to resolution by mini-trial.

IV.

INITIATION OF PROCESS

The suggestion that a mini-trial be conducted may emanate from either party. If the non-governmental party requests a mini-trial, the Department's trial attorney is requested to submit that request, along with his or her recommendations and those of the interested agency, to his or her supervisor. If the Department's attorney, in the absence of a request by the non-governmental party, concludes that a mini-trial would be advantageous, he or she shall obtain the recommendations of the interested agency, obtain approval from appropriate supervisors and then propose this procedure to the opposing party. The opposing party will be supplied with a copy of this memorandum and will be advised that a written agreement between the parties is a prerequisite to initiating the procedure. The decision to participate in a mini-trial requires the approval of the Deputy Assistant Attorney General in charge of the Branch and is solely within the discretion of the Department.

V.

PARTICIPANTS

The Government's principal participant will be the Department of Justice official with settlement authority or, where that is not feasible, the official with the authority finally to recommend acceptance of a settlement. Usually, the official or officials within the interested agency or agencies with authority to make recommendations which are binding upon the agency or agencies will participate as a secondary principal for the Government.

The non-governmental party's principal participant must be a senior level management official who possesses authority to settle the dispute in the absence of litigation. Where possible, the official should be an individual who has not participated in preparing the case for litigation.

Each party will designate one representative who will be responsible for conducting the mini-trial and ensuring that procedures are followed. The Department's attorney of record will be the Government's representative.

Where appropriate, the parties may agree upon a neutral advisor to advise the management officials who participate in the mini-trial. The neutral advisor should be a person with either legal or substantive knowledge in a relevant field. The neutral advisor should have no prior involvement in the dispute or the litigation and must possess no interest in the result of the mini-trial. The neutral advisor and the parties must agree in advance that the neutral advisor will have no further involvement in the litigation should the mini-trial fail to result in a settlement.

VI.

THE MINI-TRIAL AGREEMENT

The mini-trial agreement is a written document, signed by the principals and the representatives, in which the parties agree to the procedures to be used. While each mini-trial agreement should be structured so as to meet the needs of each individual case, every agreement must contain specific expedited time limitations for each aspect of the procedure, a statement regarding the non-binding nature of the procedure, and an agreement that the parties will seek a suspension of proceedings in the pending litigation while the mini-trial process is continuing. The mini-trial agreement will be negotiated by the representatives, with the approval of the principals. A sample mini-trial agreement is Appendix A to this memorandum.

VII.

PROCEDURES

While the procedures to be used are subject to negotiation and should be designed to meet the needs of each individual case, the following procedures are generally considered to be appropriate:

a. Time Limits: Time limitations are to be explicit, brief and strictly observed.

b. Discovery: Discovery procedures should be expedited and should be the subject of a specific provision contained in the mini-trial agreement. The parties should consider including in the agreement a limitation upon the scope of discovery as well as the number and length of depositions and interrogatories. Discovery conducted prior to the initiation of mini-trial procedures shall not be duplicated during the mini-trial process. A nongovernmental party may not conduct discovery under the mini-trial agreement if it has pending a request or requests for disclosure of information under the Freedom of Information Act. The mini-trial agreement should normally provide that discovery shall be completed at least two weeks prior to the mini-trial.

c. Written Submittals: The parties should normally provide for an exchange of written submittals prior to the mini-trial. The mini-trial agreement should set forth the timing, format and length of the submittals. The written submittal of the nongovernmental party must include an analysis of its quantum claim which includes information regarding the source of the figures. At the time the written submittals are exchanged, the parties should also exchange exhibit lists and, if applicable, witness lists.

d. Location of the Mini-Trial: The location of the mini-trial shall be specified in the mini-trial agreement. Government facilities may be used; the Government will not agree to pay any part of a fee charged for the use of nongovernmental facilities.

e. Manner of Presentation at the Mini-Trial: The allocation of the time agreed upon for presentation of the case to the principals shall be set forth in the mini-trial agreement. The presentation should exceed one day only in exceptional circumstances. The time allotted to each representative may be used as that representative desires, including examination of or presentations by witnesses, demonstrative evidence and oral argument. Recording or verbatim transcription of the testimony shall not be allowed. The mini-trial agreement may provide for an opportunity for the principals to examine any witnesses.

f. Neutral Advisor: The parties may agree that a neutral advisor shall be present during the mini-trial in order to provide an opinion, upon request, to the principals on any issue upon which the parties agree in advance. The neutral advisor should be selected by agreement of the parties. The advisor should be a person with legal and/or relevant substantive knowledge and should be a person who has had no prior involvement in the dispute or the litigation. The parties shall agree in advance upon the amount of compensation to be paid to the neutral advisor and the manner in which this compensation shall be paid. The neutral advisor shall agree in advance that he or she will have no further involvement in the case should the mini-trial fail to dispose of the litigation.

g. Settlement Discussions: The principals shall meet immediately following presentation of the mini-trial to discuss the possibility of settling the claim. This meeting shall be private, although the mini-trial agreement may provide that each principal may designate an individual to act as his or her technical advisor. This individual may not be the party's representative. A principal may consult with his or her attorneys, although they may not take part in the discussions regarding settlement.

h. Confidentiality: The discussion which takes place between the principals shall not be used for any purpose in any subsequent litigation.

i. Termination: Any party may terminate mini-trial proceedings at any time.

APPENDIX A

MINI-TRIAL AGREEMENT
BETWEEN THE
UNITED STATES
AND

____

This mini-trial agreement dated this _____ day of _____________, 19__, is executed by ____[name]______, ____[title]____, on behalf of the United States and by ______[name]_______, on behalf of ____[name of plaintiff]____, hereinafter referred to as plaintiff.

WHEREAS: On the _____ day of __________, 19__, plaintiff and the United States entered into Contract No. ____________________ ____for the ____ ____;

WHEREAS, under the Contract Disputes Act of 1978, plaintiff on ________________, 19__, filed a suit in the United States Claims Court alleging ____ ____ ____ ___________________________________;

WHEREAS, the United States and plaintiff have agreed to submit __[name of case]__ No. __[docket no.]__ to a "Mini-Trial";

NOW THEREFORE, subject to the terms and conditions of this "Mini-Trial" agreement, the parties mutually agree as follows:

1. The United States and plaintiff will voluntarily engage in a non-binding mini-trial on the issue of ______________________________ ____ ____.

The mini-trial will be held on ________________________, 19__, at __[time of day]__ at ______[location]______.

2. The purpose of this mini-trial is to inform the principal participants of the position of each party on the claim and the underlying bases of the parties' positions. It is agreed that each party will have the opportunity and responsibility to present its "best case" on entitlement and quantum.

3. The principal participants for the purpose of this mini-trial will be ____ for the United States and ______________________________ for plaintiff. The principal participants have the authority to settle the dispute or to make a final recommendation concerning settlement. Each

party will present its position to the principal participants through that party's designated representative, _______________, for the United States, and ____________, for plaintiff.

4. The parties have agreed that ____________________ shall serve as a neutral advisor to the principals. The neutral advisor shall be compensated as set forth in a separate agreement with the advisor. The advisor has warranted that he or she has had no prior involvement with this dispute or litigation and has agreed that he or she will not participate in the litigation should the mini-trial fail to resolve the dispute.

The neutral advisor shall participate in the mini-trial proceedings and shall render an opinion, upon request, on the following issues: ____

____

____. NOTE: This clause is to be used only if the parties have agreed that the participation of a neutral advisor would be useful.

5. All discovery will be completed in the twenty working days following the execution of this agreement. Neither party shall propound more than 25 interrogatories or requests for admissions, including subparts; nor shall either party take more than five depositions and no deposition shall last more than three hours. Discovery taken during the period prior to the mini-trial shall be admissible for all purposes in this litigation,

including any subsequent hearing before any board or competent authority in the event this mini-trial does not result in a resolution of this appeal. It is agreed that the pursuit of discovery during the period prior to the mini-trial shall not restrict either party's ability to take additional discovery at a later date. In particular, it is understood and agreed that partial depositions may be necessary to prepare for the mini-trial. If this matter is not resolved informally as a result of this procedure, more complete depositions of the same individuals may be necessary. In that event, the partial depositions taken during this interim period shall in no way foreclose additional depositions of the same individual into the same or additional subject matter for a later hearing.

6. No later than _____ weeks prior to commencement of the mini-trial, the plaintiff shall submit to the United States a quantum analysis which identifies the costs associated with the issues that will arise during the mini-trial and which identifies the source of all data.

7. The presentations at the mini-trial will be informal. The rules of evidence will not apply, and witnesses may provide testimony in narrative form. The principal participants may ask any questions of the witnesses. However, any questioning by the principals, other than that occurring during the period set

aside for questions, shall be charged to the time period allowed for that party's presentation of its case as delineated in paragraph 9.

8. At the mini-trial proceeding, the representatives have the discretion to structure their presentations as desired. The presentation may include the testimony of expert witnesses, the use of audio visual aids, demonstrative evidence, depositions, and oral argument. The parties agree that stipulations will be utilized to the maximum extent possible. Any complete or partial depositions taken in connection with the litigation in general, or in contemplation of the mini-trial proceedings, may be introduced at the mini-trial as information to assist the principal participants to understand the various aspects of the parties' respective positions. The parties may use any type of written material which will further the progress of the mini-trial. The parties may, if desired, no later than _____ weeks prior to commencement of the mini-trial, submit to the representatives for the opposing side a position paper of no more than 25 - 8 1/2" X 11" double spaced pages. No later than ___ week(s) prior to commencement of the proceedings, the parties will exchange copies of all documentary evidence proposed for use at the mini-trial and a list of all witnesses.

9. The mini-trial proceedings shall take one day. The morning's proceedings shall begin at ____ a.m. and shall continue until _____ a.m. The afternoon's proceedings shall begin at ____ p.m. and continue until ____ p.m. (A sample schedule follows.)

SCHEDULE

9:00 a.m. - 10:00 a.m.	Plaintiff's position and case presentation.
10:00 a.m. - 11:00 a.m.	United States' cross-examination.
11:00 a.m. - 11:30 a.m.	Plaintiff's rebuttal.
11:30 a.m. - 12:00 noon	Open question and answer period.
12:00 noon - 1:00 p.m.	Lunch
1:00 p.m. - 2:00 p.m.	United States' position and case presentation.
2:00 p.m. - 3:00 p.m.	Plaintiff's cross-examination.
3:00 p.m. - 3:30 p.m.	United States' rebuttal.
3:30 p.m. - 4:00 p.m.	Open question and answer period.
4:00 p.m. - 4:30 p.m.	Plaintiff's closing argument.
4:30 p.m. - 5:00 p.m.	United States' closing argument.

10. Within ____ day(s) following the termination of the mini-trial proceedings, the principal participants should meet, or confer, as often as they shall mutually agree might be productive for resolution of the dispute. If the parties are unable to resolve the dispute within ____ days following

completion of the mini-trial, the mini-trial process shall be deemed terminated and the litigation will continue.

11. No transcript or recording shall be made of the mini-trial proceedings. Except for discovery undertaken in connection with this mini-trial, all written material prepared specifically for utilization at the mini-trial, all oral presentations made, and all discussions between or among the parties and/or the advisor at the mini-trial are confidential to all persons, and are inadmissible as evidence, whether or not for purposes of impeachment, in any pending or future court or board action which directly or indirectly involves the parties and the matter in dispute. However, if settlement is reached as a result of the mini-trial, any and all information prepared for, and presented at the proceedings may be used to justify and document the subsequent settlement. Furthermore, evidence that is otherwise admissible shall not be rendered inadmissible as a result of its use at the mini-trial.

12. Each party has the right to terminate the mini-trial at any time for any reason whatsoever.

13. Upon execution of this mini-trial agreement, if mutually deemed advisable by the parties, the United States and the plaintiff shall file a joint motion to suspend proceedings in the Claims Court in this case. The motion shall advise the

court that the suspension is for the purpose of conducting a mini-trial. The court will be advised as to the time schedule established for completing the mini-trial proceedings.

DATED ______________________	DATED ______________________
BY: ______________________	BY: ______________________
Principal participant for the United States	Principal participant for ______________________
______________________	______________________
Attorney for the United States	Attorney for ______________

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

NOV - 7 1989

OFFICE OF CONGRESSIONAL
AND LEGISLATIVE AFFAIRS

Honorable Carl Levin
Chairman
Subcommittee on Oversight of
Government Affairs
Committee on Governmental Affairs
United States Senate
Washington, D. C. 20510-6250

Dear Mr. Chairman:

Thank you for the opportunity to clarify some of the issues discussed at the September 19, 1989 hearing on S. 971, the Administrative Dispute Resolution Act of 1989. I have enclosed our responses to your questions and those of Senator Lieberman which were addressed in your October 3, 1989 letter.

The Office of Management and Budget has advised that there are no objections to the presentation of these views from the standpoint of the President's program.

We appreciate the opportunity to provide you with this information. If we can provide you with additional information, please do not hesitate to contact us.

Sincerely,

Charles M. Hassett
Acting Director
Legislative Analysis Division

Enclosure

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U.S. ENVIRONMENTAL PROTECTION AGENCY'S
ANSWERS TO SENATOR LEVIN'S
QUESTIONS FROM SEPTEMBER 19, 1989 HEARING

Q.1. What are the percentage of cases which are submitted to ADR techniques and, in particular, the percentage of these cases which are enforcement cases?

(A) The percentage figure for cases submitted to ADR at EPA is so small as to be negligible. This is to be expected, however, with fledgling programs such as ADR. Approximately, fifteen cases have been nominated by our Regions for use of ADR, including a few which were defensive actions. Of these nominations, three enforcement cases were mediated to settlement, and three are now in the process of being mediated. In the one case where the Agency attempted to use a minitrial, the case was not resolved. Curiously, almost every other nominated case was settled by traditional negotiation prior to even suggesting ADR to the other parties to the dispute.

Additionally, there are provisions for ADR use in approximately half a dozen of the Agency's consent orders and agreements which prescribe ADR for certain future disputes between the parties.

Q.2. Please provide data on the savings in time and cost experienced as a result of EPA's use of ADR methods.

(A) Of the seven negotiated rulemakings undertaken by EPA, five resulted in a final rule. We estimate that the average duration of the rule promulgation period decreased from 42 months for a traditional major rulemaking, to 26 months for a negotiated rulemaking. It is important to note, however, that this estimate is based on very little empirical evidence. Nonetheless, the results are promising.

There is no numerical data on the savings in time and cost experienced as a result of EPA's use of ADR in enforcement litigation. All those who have been involved in an ADR process at the Agency, however, have stated that the process saved them a great deal of time and effort.

Q.3. Please provide information about EPA's employee training program on how and when to use ADR methods.

(A) Information about how and when to use ADR methods can be found in the "Final Guidance on Use of Alternative Dispute Resolution Techniques in Enforcement Actions," dated August 14, 1987, a copy of which is attached.

The ADR training program for EPA enforcement employees involves two efforts which center on the Agency's Negotiation Skills Training Course. This course is held in every EPA regional office and at headquarters every year, and instructs EPA enforcement personnel, both attorneys and technical staff, how to negotiate enforcement disputes. As part of this course, the instructors briefly cover the basics of ADR, and EPA's policy to use it in appropriate cases. Additionally, in conjunction with the course, one of the instructors usually convenes a meeting of regional enforcement personnel, under the auspices of the Regional Counsel's Office, to discuss specific applications of ADR to the Region's enforcement docket.

Q.4. In Mr. Reich's prepared testimony, he indicated strong support for the confidentiality provisions contained in S. 971. Does S. 971 also provide adequate protection of the public's right to know the outcome of proceedings which are of concern to the affected community?

(A) S. 971 has no effect on the public's right to know the outcome of proceedings which are of concern to the affected community. It is important to remember that ADR techniques are only processes, the means by which parties reach an outcome. EPA continues to support the public's right to know relevant outcomes of disputes, whether in the ADR context or otherwise.

Q.5. At the hearing, there was discussion of EPA's current use of arbitration as authorized by Congress. S. 971 would expand this authority. Please provide the Subcommittee with a description of each legal challenge, if any, that has been made to EPA's use of arbitration and the outcome of each such case. Is there a need to expand the use of arbitration within the Agency?

(A) While there were some comments on EPA's Superfund arbitration rules, there have been no challenges to EPA's use of arbitration. Because these rules only became effective on August 28 of this year, we have had no case experience with them as yet.

Arbitration has been approved by Congress for our Superfund programs for cases that are routine, non-precedential, and which usually involve small amounts of money. This use of arbitration can augment the work being done by our Administrative Law Judges. Arbitration should be thought of as an adjunct to existing litigation tools where the parties prefer a rapid decision in a small case which offers no important issues.

Q.6. Should neutrals use in a matter involving the federal government be government employees? To what extent should neutrals have expertise in the area which is the subject of the dispute?

(A) There are cases where neutrals used in a matter involving the federal government could be federal employees. In some cases a neutral may be available from a different agency than the one involved in the dispute. Certainly, the Federal Mediation and Conciliation Service and the Community Relations Service at the

Department of Justice could provide ADR services at appropriate times.

A mediator should have sufficient general knowledge of the subject matter of the dispute to understand and follow the issues, assist the parties in recognizing and establishing priorities and the order of consideration of those issues, ensure that all possible avenues and alternatives to settlement are explored, and otherwise serve in the most effective manner. In other forms of ADR requiring either a decision or an opinion from the neutral such as arbitration or factfinding, it is mandatory that the neutral selected have expertise in the area which is the subject of the dispute.

U.S. ENVIRONMENTAL PROTECTION AGENCY'S ANSWERS TO SENATOR LIEBERMAN'S QUESTIONS FROM SEPTEMBER 19, 1989 HEARING

Q.1. Do you support the use of alternative dispute resolution mechanisms in cases involving the issuance or revocation of a permit?

A. ADR mechanisms can be very useful in resolving disputes which cannot be effectively resolved through traditional negotiation activities. Disputes may arise in the permit issuance process which would be appropriate for use of ADR mechanisms.

Q.2. Many of EPA's cases involve threats to the public health or the environment. In some cases, the nature of the threat may not be evident until the middle of a case. How would EPA deal with a serious threat to public health or the environment that arises in a case where the Agency has committed to binding arbitration or some other ADR procedure? Can ADR procedures provide for the emergency type of relief that can be secured through the judicial process?

A. EPA is sensitive to the concern raised about maintaining the Agency's ability to address situations which involve threats to public health or the environment. This concern is incorporated into the procedure followed by the Agency in selecting appropriate cases for the use of ADR procedures.

If the use of an ADR mechanism would in any way restrict or diminish EPA's ability to address a situation that presents a threat to public health or the environment, ADR will not be used. In addition, the use of an ADR mechanism does not affect EPA's normal authorities for addressing emergency relief situations. Should an emergency arise or become apparent during the use of an ADR process, EPA would respond as necessary to protect human health and the environment.

EPA is presently using binding arbitration only in disputes in which binding arbitration is authorized by statute. Specifically, is includes monetary disputes involving Superfund reimbursement claims for amounts less than $500,000. Because the authorized arbitration procedures are limited to monetary reimbursement disputes, the use of arbitration cannot limit the ability of EPA to address threats to public health or the environment.

Q.3. Is ADR appropriate for cases where the Agency is seeking compliance with a regulation? Studies indicate that arbitrators or mediators tend to split the difference between the parties. Is this approach appropriate in cases where the Agency is seeking injunctive relief to comply with the law?

A. Where the Agency is seeking compliance with a specific regulation, it is inappropriate for EPA to use ADR to make determinations regarding the legal liability of the alleged violator or whether it needs to comply with the regulation. However, ADR may be appropriate to assist the Agency in reaching determinations relative to the precise form or appropriate timing of compliance.

Mediators do not make decisions or offer opinions on substance to the parties; rather they assist the parties in reaching their own decisions.

Q.4. One of the main purposes of penalties in environmental cases is to deter other potential violators. What can EPA do to ensure that ADR procedures achieve this deterrence effect?

A. ADR mechanisms are not a substitute for EPA's aggressive prosecution of statutory violations. Rather, ADR mechanisms are a tool for use by EPA in effectively resolving enforcement disputes. The use of an ADR mechanism does not restrict EPA's final responsibility to assess the appropriateness of a settlement of an action for statutory violations.

Q.5. How do ADR procedures take into account the need for public involvement in many of EPA's programs? For example, if ADR is used in the decisions about whether to grant a permit, how would the public become involved in the process? If the Agency starts using ADR on a wide-scale, would public interest groups or other members of the public have the necessary resources to participate in the process?

A. The use of ADR mechanisms will not affect the current participation of the public in EPA programs. To the extent that express provision exists by statute or regulation for public participation in EPA programs, EPA will not use any ADR mechanism in such a way as to hinder such public participation. In fact, the use of an ADR professional by EPA may in, some situations, allow broader participation of the public in environmental decisions. In a recent EPA civil action against the City of Sheridan, Wyoming, the use of a mediator to assist EPA negotiations allowed the public expanded participation which produced an outcome that was more environmentally beneficial than would have been possible through traditional enforcement processes.

Q.6. Is ADR ever appropriate to use in the decision about which remedy should be selected at a Superfund site?

A. The use of an ADR mechanism by the Agency is not appropriate as a method of selecting a remedy at a Superfund site. It may, however, in regard to a Superfund site, be appropriate to use an ADR mechanism to facilitate EPA's discussions with the local community regarding a selected remedy.

Q.7. Would use of ADR in general at Superfund sites exclude the public participation that the statute envisions? What, specifically, would be the effect of binding arbitration on this participation?

A. The use of ADR mechanisms will not affect the current participation of the public in the EPA Superfund program. To the extent that express provision exists by statute or regulation for public participation in EPA programs, EPA will not use any ADR mechanism in such a way as to hinder such public participation.

At present no authority exists for EPA to use binding arbitration to determine remedies at Superfund sites. Regarding the use of binding arbitration in Superfund reimbursement claims for amounts under $500,000, the statute specifically provides for public comment following arbitration decisions.

STATEMENT
OF
MARSHALL J. BREGER

Chairman
Administrative Conference of the United States

to the
Subcommittee on Oversight of Government Operations
Committee on Governmental Affairs
United States Senate

on

S. 971, The Administrative Dispute Resolution Act

September 14, 1989

I would like to thank you for the opportunity to comment on S. 971, the Administrative Dispute Resolution Act of 1989. The views expressed in this testimony are solely my own and are not those of the Administration. The Administration's views on S. 971 are being provided at today's hearing by the Department of Justice and the Environmental Protection Agency.

The subject matter addressed by S. 971 is central to the goals of the Administrative Conference. I am convinced that what has come to be known as "ADR" - alternative means of dispute resolution - is very valuable, and that many - probably most - federal agencies can and should be doing more to build these methods into their own decisionmaking and problem solving processes.[1] I am also convinced that a legislative spur is needed to encourage thoughtful use of ADR and make agency practice simpler and more productive for everyone involved. The proposed Administrative Dispute Resolution Act, S. 971, would provide such a spur.

The Utility of ADR

The Administrative Conference has been in the forefront of efforts to encourage agency use of ADR. In 1982, we recommended that federal agencies consider the use of negotiation among affected parties as a means of drafting proposed regulations for agency consideration.[2] That same year we recommended that agencies provide informal procedures in lieu of traditional adjudication to resolve disputes under federal grant programs.[3] And in 1986 we undertook what is perhaps our most comprehensive examination of the subject and recommended that administrative agencies adopt alternative methods of resolving a broad range of disputes.[4] ADR is the subject of a number of Conference recommendations.[5]

Appropriate use of ADR methods throughout the federal government will:

- enhance the responsiveness of agencies
- increase the acceptability of their decisions
- help reduce the contentiousness, delay, and expense often associated with agency decisionmaking.

As Chief Justice Rehnquist has stated:

> I think one of the most critical things in American society today is the cost of litigation, and the implementation in some places, but not everywhere, of alternative means for dispute resolution to avoid the tremendous delays that people encounter in getting a dispute settled. . . .
>
> Some people have scoffed at alternative dispute resolution as a kind of a denial of access to the courts. But I know, from some of the clients I had back in practice; they wanted their disputes settled. . . . The idea of paying nearly as much in fees as the amount involved in order to get a judgment is what really angered them. . . .

Our study of ADR also persuades us that the same forces that have made these methods attractive to private disputants render them useful in many cases that federal agencies decide, or to which the government is a party. The need for simplified dispute resolution processes is underscored by the growth in federal regulatory schemes and related litigation. Federal agencies are now involved in tens of thousands of disputes as parties, and also decide far more cases than the federal courts - hundreds of thousands annually. This fact is the result of an immense growth in recent years of controversies that manifest themselves in formal agency proceedings, myriad regulatory decisions, and court actions challenging agency decisions or seeking enforcement of legislative or administrative requirements. While many portions of the administrative process were created to provide a range of dispute resolution alternatives to court litigation, in many eyes they have themselves become a part of the problem. Numerous government decisions now require resource-intensive procedures that are expensive, cause delay, dampen the likelihood of consensual resolution, and disrupt planning and management for both the agency and the private parties involved.

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[1] Conference Recommendation 86-3, 1 CFR § 305.86-3, describes these methods, which include mediation, factfinding, conciliation, minitrials and arbitration.

[2] *See* 1 CFR § 305.82-4: Procedures for Negotiating Proposed Regulations (Recommendation 82-4).

[3] *See* 1 CFR § 305.82-2: Resolving Disputes Under Federal Grant Programs (Recommendation No. 82-2).

[4] *See* 1 CFR § 305.86-3: Agencies' Use of Alternative Means of Dispute Resolution (Recommendation No. 86-3).

[5] In addition to those listed in the footnotes above, these include Conference Recommendations 87-11, Alternatives for Resolving Government Contract Disputes, 1 CFR § 305.87-11; 87-5, Arbitration in Federal Programs, 1 CFR § 305.87-5; 86-8, Acquiring the Services of "Neutrals" for Alternative Means of Dispute Resolution, 1 CFR § 305.86-8; 84-7, Administrative Settlement of Tort and Other Monetary Claims Against the Government, 1 CFR § 305.84-7.

A few may argue that there really is no "litigation crisis" over which to concern ourselves. There can be no doubt, though, that conventional litigation is often time consuming and costly to all the parties involved. Equally important, the transaction costs of our country's litigiousness divert crucial national resources into proliferating legal and bureaucratic processes, and have likely harmed the competitive position of the United States in markets abroad and cut productivity at home.

Available data show that several agencies have already used ADR methods in ways that have saved time, reduced costs, and produced fair results. I do not suggest that the various ADR techniques are a panacea. The Conference's efforts in ADR are intended to make dispute resolution in the federal administrative process more efficient and more satisfying to the parties involved. We seek, as Abraham Lincoln succinctly put it, to

> "Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser - in fees, expenses, and waste of time. As a peacemaker, the lawyer has a superior opportunity of being a good man. There will still be business enough."[6]

ADR processes, I should note, are now being used at the state government level to good effect and in a variety of private sector cases.[7] Methods have included court-annexed arbitration, "multi-door courthouses," summary jury trials, minitrials, labor and commercial arbitration, and neighborhood justice centers. To date, over twenty state legislatures have enacted laws establishing statewide mediation centers or other dispute resolution options.

Indeed, with little fanfare, several states have been considerably more imaginative than the federal government in carrying out government-based experiments with these dispute resolution methods. Of course, public labor mediation or arbitration is more common at the state level, as are a variety of other uses for mediation and other ADR skills in particular states. The states have used negotiation to resolve disputes over the siting of industrial, hazardous waste or other facilities, and routinely arbitrate many consumer and other claims. In five states, central dispute resolution agencies have been established. The agencies' missions and accomplishments vary considerably, but they may generally be said to engage in building agency and public awareness of dispute resolution options, mediating disputes, setting up mediation and negotiation programs, consulting with interested state agencies, suggesting legislation, and compiling rosters of neutrals.

Both private entities and the courts have been very involved in using arbitration and other ADR methods. The Federal Courts Improvement Act, P.L. 100-702, authorized numerous U.S. district courts to use binding arbitration in civil actions. The need within federal agencies is even greater, especially given that administrative adjudications in agencies far outnumber filings in federal court. The Departments of Labor and Health and Human Services alone employ over 800 administrative law judges and process 400,000 cases each year. Although I am not suggesting that all such cases are suitable candidates for arbitration, it is imperative, in my view, that the federal government have the capacity to pick up on, and extend, the creativity that the courts and the private sector have shown in dispute resolution.

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[6] The Collected Works of Abraham Lincoln, Vol. II, pp. 81-82 (T. Basler, et al.ed. 1953-55).

[7] *E.g.*, John H. Wilkinson, *ADR Is Increasingly Effective, Averts Litigation in Many Cases*, National Law Journal (April 4, 1988, p. 1).

Some doubters have raised concerns that resolving many disputes through informal means will fail to yield precedents for future jurists, undermine predictability, produce inaccurate decisions, or contravene the public interest via secret negotiations. Critics have suggested that governmental conflicts differ so greatly from private ones that ADR is not very applicable, either wholly or in most cases. A few go so far as to argue that certain ADR mechanisms, like arbitration, endanger the public fisc or may be unconstitutional. Others declare categorically that broad classes of cases (e.g., those involving government claims or civil rights) may be inappropriate for ADR. They fear that settlements reached through ADR risk excessively ad hoc procedures, inaccurate results, second class justice, and reduced predictability. These concerns deserve close attention because ADR should not be abused so as to promote outcomes that are unreviewable, unfair, or against the public interest. For many kinds of cases, litigation will remain necessary or even the dispute resolution mechanism of choice. ADR legislation should encourage *complementary* resolution methods, not usurp current regulatory procedures.

I believe that the totality of the critics' fears, however, fails to make the case that ADR is not a needed complement to our dispute resolution arsenal. First, let me deal with the "legality" concerns. These concerns, to the extent that they are valid, surround *only* arbitration and no other forms of ADR, because arbitration is the only form that actually shifts any decisionmaking into private hands. The possible objections to arbitration are that (1) federal executive authority, as defined in *Buckley v. Valeo*, 424 U.S. 1 (1976), is inappropriately delegated outside the government, (2) judicial power under Article III of the Constitution is placed in private hands, and (3) private arbitration may violate the requirements of due process. Because these concerns cannot be given short shrift, the Conference commissioned Professor Harold Bruff of the University of Texas Law School to examine these issues in detail. His report, which is published in a volume entitled *Agency Arbitration*, analyzed these constitutional issues and suggested ways to structure arbitral processes to minimize such concerns.[8] I commend that study to you.

It should be noted that delegation to private arbiters of decisions involving government claims already have been approved in several important instances.[9] Arbitration of many federal employees' labor grievances under the Civil Service Reform Act and of pesticide-related and other environmental disputes have not been constitutionally problematic. The Medicaid scheme whereby private providers decide claims over government reimbursement for health care[10] has also been explicitly approved in the face of a constitutional challenge. *Schweiker v. McClure*, 456 U.S. 188 (1982), *rev'g. McClure v. Harris*, 503 F.Supp. 409, 414-17 (N.D. Cal. 1980). In deciding whether the Medicare decisional procedures were legally adequate, the Court was seemingly unconcerned over the conferral of governmental authority on private parties--an issue plainly of concern to the court below. Many federal contract claims were decided by early Board of Contract Appeals members who were only part-time government employees, and Congress has directed that most of the

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[8] Public Programs, Private Deciders: The Constitutionality of Arbitration in Federal Programs, 68 Texas L. Rev. ____ (1989), ACUS Studies in Administrative Law and Procedure 88-1; 1 CFR § 305.87-5: Assuring the Fairness and Acceptability of Arbitration in Federal Programs (Recommendation 87-5).

[9] A number of federal statutes specifically authorise the resolution of government disputes through binding arbitration. See, e.g., 22 U.S.C. § 2398(i) (investment guaranties under foreign assistance programs); 46 U.S.C. § 749 (Suits in Admiralty Act); 46 U.S.C. § 786 (Public Vessels Act); 20 U.S.C. 5 U.S.C. § 7121(b) (binding arbitration of employee grievances under collective bargaining agreements pursuant to the Civil Service Reform Act); and Public Law 99-499, § 122 (Superfund Amendments).

[10] 42 U.S.C. § 1395u (1982).

Education Appeal Board's members (who decide grant disputes) be from outside the government.[11] When Congress intends for arbitration to be non-binding, it says so explicitly.[12] Given this legislative and constitutional history, one would imagine that a presumption of constitutionality would attach to the modest, carefully structured proposal to allow *voluntary* arbitration in selected contexts.

I agree fully with the Department of Justice regarding the need for public accountability in executive decisionmaking. Ultimately, such accountability must rest with federal executive officials subject to presidential supervision. However, arbitration can in no way be said to reduce accountability in agency decisionmaking because it can only be invoked with the prior, knowing agreement of responsible agency officials, who are subject to presidential supervision. Arbitration, in other words, would be employed only if the appropriate government official wants it. Indeed, in a sense, this bill can be said to give executive officers broader discretion in dispute resolution by expanding the tools available to executive branch officials who choose to use them, subject, of course, to the President's general oversight. What the bill does mean, however, is that the government cannot agree to arbitrate and then pull out if it does not like the results.

Moreover, arbitration need not lead to arbitrators' "splitting the difference." Section 585(a) specifically provides that a party may make its agreement to arbitrate subject to a condition that the award be within a range of possible outcomes. Parties wishing to avoid "compromise" arbitral awards can so condition their submissions.

Some have expressed doubts about ADR's impact on the rights of less powerful members of our society, fearing that these persons may be pressured by a mediator to accept less than their due (or, in any case, less than they might win at a full trial). Other critics have even argued that consensual means of dispute resolution divert attention from structural conflict in society. In my view, if the only route a grievant has is an expensive, procedurally complex hearing process, the ordinary citizen may often have little or no practical choice but to accept what is offered. ADR methods offer additional routes to justice, and can provide opportunities to resolve the social problems of those who choose to focus on their grievances rather than their abstract claims.

I do not agree with those who fear either that ADR settlements may endanger the public "fisc" or that private arbitrators cannot possibly understand and comply with the "web" of statutory and regulatory limits on agencies. Private arbitrators, like agency disbursing officers, have access to Comptroller General opinions on particular expenditures, and to Offices of General Counsel. We should recognize also that an equivalent "web" of constitutional, statutory, administrative, private, and judge-made law binds arbitrators who resolve private cases daily. Public sector labor arbitration under CSRA and other laws has worked well, subject to many added restraints. We should underestimate neither the extent to which arbitrators can come to grasp, or be educated as to, applicable restrictions, nor the extensive array of watchdogs in GAO, inspector general offices, Congress and elsewhere to bring abuses to light.

I am confident that sensible processes can be developed, where needed, to allow the use of ADR without undermining decisional accountability or compromising public confidence in the administrative process. For example, agency officials already routinely negotiate and adjust tens of thousands of disagreements over contracts, penalty assessments, and other major decisions pursuant to guidance that is generally viewed as adequate. To take one instance, the Office of the Inspector General at the Department of Defense has specifically endorsed the documentation standards developed by the Administrative Conference for ADR in contract claims;[13] indeed, that Office specifically approved the use of ADR in one large, controversial case by the Corps of Engineers as being in the government's best interest. Criticizing current dispute procedures, the Inspector General applauded the Corps' innovative approach and predicted "good things ahead" for the Corps' program. The Environmental Protection Agency has likewise been successfully pursuing alternatives to conventional litigation. What these examples demonstrate is that, in the federal arena, the mere presence of a mediator does not affect the validity of a consensual settlement worked out by the parties.

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[11] 20 U.S.C. § 1234(c) (1982).

[12] *See* 42 U.S.C. § 4083 (Supp. 1989), providing that arbitration awards under the National Flood Insurance Program "shall be advisory in nature" and become final only upon approval by the Secretary of the Treasury.

[13] Letter from Derek Vander Schaaf, Deputy Inspector General, Department of Defense, to Marshall J. Breger, dated November 16, 1987.

The Need for Legislation

Unfortunately, few federal agency officials have emulated the ADR leadership of their counterparts in the Corps of Engineers, EPA or the states. The Administrative Dispute Resolution Act, perhaps first and foremost, places a congressional imprimatur on the use of alternatives to conventional litigation. It tells agencies, in effect, that they now have additional arrows in their dispute resolution quiver--and that they are encouraged to use whatever arrow is most useful. In my view, the bill would go far to shape a positive government policy that encourages informed public sector use of ADR--much as the U.S. Arbitration Act did for arbitration in many private sector disputes. It will encourage agency personnel to make more productive use of mediation or other processes. While the Congress has on a few occasions encouraged agencies to make use of ADR,[14] it has also at times saddled them with decisional procedures that can only be viewed as procrustean. In addition, GAO has (without justification, in the view of the Administrative Conference and many experts) gone so far as to interpret Congress' general silence as a flat prohibition of some kinds of ADR, including arbitration. S. 971 will eliminate this harsh presumption, validate the examples set by innovators like those at the Environmental Protection Agency and the Army Corps of Engineers, and encourage other agencies to act.

The main procedural thrust of the bill would be to foster the use of flexible alternatives, allowing the parties to shape procedures to meet their needs on a case by case basis. Although the legislation would potentially apply to all kinds of disputes relating to agency administrative programs, S. 971 is based wholly on the principle of consent - every process addressed in the bill would be invoked only with the knowing agreement of the parties, including the government. Any ADR legislation should have a similar, i.e., consensual, underpinning.

A corresponding premise of S. 971 is that the grant of maximum procedural discretion should not undermine agency accountability. The bill would recognize at the outset that certain kinds of government decisions will not be appropriate for ADR, and would help agencies delineate those kinds of cases that are appropriate. (Section 582(b)) Agency decisions to employ ADR would be reviewable pursuant to these criteria after entry of the final order, but only under a restricted standard of judicial review. This would give agencies great flexibility without giving up an ultimate check by the judiciary. In addition, the bill's reporting requirement (discussed below) would enable Congress to oversee ADR use and deal with problems that occur in practice. It might be useful if I outline some of the advantages of S. 971.

Specific Comments on S. 971

Title I of the Administrative Dispute Resolution Act encourages each agency to review its dispute resolution processes and to promulgate policies that address the use of the full range of dispute resolution methods, including mediation, conciliation, minitrials, factfinding, arbitration, and negotiated rulemaking. Section 101 encourages agencies to consult with the Administrative

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[14] Examples include the labor and civil rights responsibilities assigned to the Federal Mediation and Conciliation Service, the Community Relations Service of the Department of Justice, and the National Mediation Board. Other cases where Congress has encouraged these methods include the Civil Service Reform Act's admonition to the Merit Systems Protection Board to experiment with consensual methods, and explicit arbitration authority for some Superfund, pesticide-related, and other environmental disputes. Recently, Congress in January 1988 required the U.S. Department of Agriculture to reverse itself and submit to state-mandated farmer-lender mediation, and to offer matching grants to help support such mediation programs in as many states as possible. Farm Credit Act of 1987, Pub. L. No. 100-233. The results here may prove more effective than those under the Dispute Resolution Act of 1980, 28 U.S.C. App. § 1, which came to naught when no funds were appropriated to carry out its goals.

Conference, the Federal Mediation and Conciliation Service, and professional associations in developing these policies. The bill also calls for training key employees in negotiation and ADR skills, and for designating a senior official to assume responsibility as agency dispute resolution specialist and implement policies adopted under section 101.

Beyond these rudimentary steps, the bill's watchword is voluntariness. ADR methods will ultimately succeed only if federal officials and the affected parties come to view them as useful tools; forcing agencies or other parties to use them will merely create resistance. The bill recognizes this fact--while it creates a milieu in which agencies can more readily experiment, little is actually mandated except that they think about ways to do so.

The bill would add a new chapter to the Administrative Procedure Act, "ADR in the administrative process," addressing comprehensively issues arising in agency use of ADR. Except in the case of arbitration, traditionally the most formal, or "trial-type," of ADR processes, the Act would refrain from mandating specific procedures, leaving the parties discretion to fit the process to the case. Even in the case of arbitration the procedural prescriptions are quite flexible, while specifying the hearing and judicial review procedures, arbitrator's authority, and the means to enforce arbitration agreements. The bill also includes appropriate guarantees of confidentiality for communications made in the course of ADR proceedings.

The legislation would amend Section 556 of the Administrative Procedure Act, on adjudication, explicitly to authorize an administrative law judge:

1. To inform the parties as to the availability of ADR and encourage its use,
2. To hold conferences for use of ADR, and
3. Where the parties have agreed to an ADR conference, to require the attendance of a party's representative who has the authority to negotiate concerning issues in controversy.

These new procedures would be subject, of course, to agency implementing regulations. Indeed, the APA probably already permits these procedures if agencies chose to invoke them. But it is useful to give them a firm statutory foundation. A number of federal district court judges have recognized the benefits of such approaches in handling their own caseloads.

The bill would amend the Federal Tort Claims Act to authorize arbitration and other ADR methods, at both agency and court levels, in small claims. It authorizes increases in the level of agencies' authority to settle tort claims without prior Department of Justice approval from the current level (set decades ago) of $25,000. This will encourage negotiations and reduce litigation. The bill would amend the Contract Disputes Act to authorize voluntary arbitration and other forms of ADR in some cases and to encourage agencies' contracting officers and other responsible officials to make all reasonable efforts to resolve claims consensually. It would expand the authority of the FMCS - currently limited almost exclusively to private sector labor disputes - to allow FMCS mediators to aid agencies in resolving disputes relating to any federal program. S. 971 encourages agencies to provide, pursuant to specified safeguards, more opportunities for using persons other than lawyers to represent individuals in certain cases before an agency. It simplifies the procedures for agencies' finding and contracting with private mediators and other neutrals, and gives agencies greater authority to avail themselves of volunteer services and to hire qualified neutrals. We fully support these steps, several of which expressly implement recommendations of the Administrative Conference.

The Conference Role in ADR

S. 971 also would give the Conference important new support roles to assist agencies wishing to employ consensual dispute resolution methods. The Administrative Conference's membership structure - bringing together as it does government officials and general counsels, private sector representatives and academic experts - makes it an especially apt vehicle to help agencies deal with such concerns. The Conference can assist and give impetus to other departments by promoting awareness, working to bring public and private sectors together, and aiding agencies that develop an interest in resolving conflicts more effectively and expeditiously. S. 971 would recognize, and enhance, the unique opportunities the Conference affords for moving regulatory agencies to improve. The Conference would be authorized to establish optional standards for ADR neutrals in federal administrative programs, to establish a roster of qualified neutrals and make it available to interested agencies, and to enter into task order contracts for the services of neutrals that may be used on an expedited basis by other agencies. If one thinks of the Conference's task as encouraging "R & D" in the field of administrative law, these activities would be "development" supplementing our traditional "research" role of studying and recommending improvements. The Conference has been somewhat reluctant in the past to take on operational responsibilities for fear that they might divert resources otherwise needed to advance our primary mission as the government "think tank" on administrative process issues. But the Conference, in its ADR recommendations,[15] explicitly decided that we need to assume at least a temporary operational role in order to get ADR programs off the ground. These steps would simplify and expedite acquisitions of the services of mediators and other ADR neutrals by many agencies.

The Conference would also be directed in the Act to compile data and to report annually to Congress on agencies' use of ADR methods. This would be a valuable resource for informed congressional oversight and help agencies interested in evaluating their own experiences or in learning from those of others.

These expanded activities would plainly mark a milestone in the Administrative Conference's continuing work to help improve agency dispute resolution. As I noted earlier, the Conference began sustained ADR efforts with negotiated rulemaking, where its 1982 and 1985 studies and recommendations stimulated a growing number of agencies to experiment. "Reg-neg" has since emerged in some agencies, such as EPA and FAA, as a leading alternative to more traditional rulemaking techniques. The Conference subsequently expanded its focus, called formally for greater use of ADR in agency litigation, and recommended ways for agencies to take greater advantage of mediation, minitrials, settlement judges, organizational streamlining and other means now at their disposal to encourage settlement of many conflicts. (Rec. 86-3) Other recently completed research projects have led to Conference recommendations on training and hiring "neutrals" for ADR in government disputes (Rec. 86-8), negotiating Superfund cleanups (Rec. 84-4), making agency handling of tort claims less arbitrary (Rec. 84-7), use of settlement judges (Rec. 88-5), and resolving contract disputes (Rec. 87-11), as well as an evaluation of expedited procedures for employee grievances at the Merit Systems Protection Board. Several ADR research projects are ongoing. We have even received *pro bono* assistance from major law firms on several projects.

In 1987 Conference sponsored, with the assistance of nine other agencies, a government-wide colloquium on agency dispute resolution, whose proceedings have been published in the American University *Administrative Law Journal*. Additionally, we have compiled and published our *Sourcebook: Federal Agency Use of Alternative Means of Dispute Resolution*, held a seminar on issues in federal dispute resolution legislation, chaired an ongoing inter-agency working group on ADR and negotiated rulemaking. These activities reflect the Conference's commitment to outreach and "consciousness-raising" on this issue. To the extent permitted by available funding, the Administrative Conference is committed to a program that will build on the credibility we have already established among our fellow agencies to encourage ADR use.

Conclusion

In concluding, let me reiterate that the costs, delay, and inefficiency that have characterized much federal agency activity should be treated as important public policy concerns in their own right and not merely as procedural afterthoughts to consideration of substantive regulatory issues.

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[15] *E.g.*, 1 CFR § 305.87-11: Alternatives for Resolving Government Contract Disputes (Recommendation 87-11).

Federal agencies should be encouraged to use - and certainly not discouraged from using - these innovative processes to help the parties themselves reach timely, acceptable, and informed decisions consistent with the public interest. Former Deputy Attorney General Arnold I. Burns recognized the value of ADR when he stated,

> "In the long term, nothing less than a retooling of the roles of lawyers can be accepted, particularly government lawyers. This retooling should deemphasize adversarial behavior and give greater weight to the lawyer as problem solver and negotiator who can resolve controversies before they escalate into major disputes or proceed to a full hearing. This is the central challenge of the legal profession."[16]

The challenge also applies to us - those persons connected with encouraging the government's effective operation--and if we fail to embrace opportunities for experimentation which can reduce the adversary nature of our system, history will judge us harshly. If we were to return and examine some parts of the government in a dozen years, I have no doubt that many of the consensual solutions encouraged by S. 971 almost certainly will be effectively and productively in place. What remains open is whether the Congress and other key decisionmakers will be seen to have had a share in shaping this future by embracing the promise of improved dispute resolution and encouraging much wider, and much more effective, usage. While increased congressional interest and informed oversight are minimal necessities, a timely legislative imprimatur and guidance encouraging ADR use in general, and regulatory negotiation in particular, would do far more to help agencies best employ these methods.

For these reasons, I strongly urge the Committee on Governmental Affairs to report S. 971 favorably to the Senate floor. Should you have any questions, please have your staff call me or Charles Pou of this office.

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[16] 1 Admin. L.J. 447 (1987).

Excerpt from the *Texas Law Review,* "Public Programs, Private Deciders: The Constitutionality of Arbitration in Federal Programs," Vol. 67, No. 3, February 1989, by Harold H. Bruff, John S. Redditt, Professor of Law, the University of Texas School of Law

II. Arbitration: An Expanding Alternative to Litigation

A. *Statutory and Judicial Endorsement of Arbitration*

Arbitration has not always enjoyed judicial favor. Until this century, common-law courts refused to enforce agreements to arbitrate.[24] The courts distrusted the informality of arbitration and perceived it as a

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[22] *See* 7 U.S.C. § 136a(c)(1)(D)(ii) (1982); 29 C.F.R. § 1440.1 (1988).

[23] Concerns may also arise about the existence of statutory authority for agencies to refer matters to arbitration. The Comptroller General has sometimes been reluctant to find statutory authority for government arbitration. *See* Behre, *Arbitration: A Permissible or Desirable Method for Resolving Disputes Involving Federal Acquisition and Assistance Contracts?*, 16 PUB. CONT. L.J. 66, 74-79 (1986); Braucher, *Arbitration Under Government Contracts*, 17 LAW & CONTEMP. PROBS. 473, 477-78 (1952). Controls on arbitration designed to meet constitutional concerns may also assure consistency with statutory authority, because principles of fairness and accountability to executive authority are pertinent to both inquiries. The discussion that follows assumes the presence of adequate statutory authority for any particular referral to arbitration.

[24] *See* Kulukundis Shipping Co. v. Amtorg Trading Corp., 126 F.2d 978, 982-85 (2d Cir. 1942); Hirshman, *The Second Arbitration Trilogy: The Federalization of Arbitration Law*, 71 VA. L. REV. 1305, 1309-18 (1985). *See generally* Wolaver, *The Historical Background of Commercial Arbitration*, 83 U. PA. L. REV. 132, 138-44 (1934) (surveying the growth in legitimacy of commercial arbitration from the seventeenth to the twentieth century).

threat to their own jurisdiction.[25] Justice Story captured the prevailing view:

> [A]rbitrators, at the common law, possess no authority whatsoever, even to administer an oath, or to compel the attendance of witnesses. . . . They are not ordinarily well enough acquainted with the principles of law or equity, to administer either effectually, in complicated cases; and hence it has often been said, that the judgment of arbitrators is but rusticum judicium.[26]

Statutes eventually endorsed arbitration and defined its relation to the courts. The Federal Arbitration Act of 1925 (FAA)[27] attempted to "revers[e] centuries of judicial hostility to arbitration agreements . . . and to place [them] 'upon the same footing as other contracts.' "[28] The FAA applies to contracts within the federal maritime and commerce powers and makes agreements to arbitrate "enforceable, save upon such grounds as exist at law or equity for the revocation of any contract."[29] The Act authorizes federal courts to compel arbitration[30] and allows them to overturn awards only on very limited grounds, such as corruption of the arbitrator or the granting of an award in "manifest disregard of the law."[31]

As arbitration became a familiar feature of commercial and labor practice, regularized by its own institutions and mores, courts were less likely to view it as unacceptable "rough justice." Recent Supreme Court cases generally embrace arbitration.[32] One likely explanation for this reversal is the judicial self-interest in reducing burdensome case loads. Many observers—including some federal judges—argue that the case load threatens the federal judiciary's capacity to perform essential functions.[33] The search for case load solutions may skew legal doctrine,[34] and one would expect the Court to err toward *excessive* receptivity to alternative fora so long as they do not displace the courts' most valued function of deciding major statutory and constitutional cases.

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[25] *See* Kanowitz, *Alternative Dispute Resolution and the Public Interest: The Arbitration Experience*, 38 HASTINGS L.J. 239, 251-55 (1987). Indeed, in the early days there was a threat to judges' pocketbooks, because "judges depended mainly or almost entirely on fees" for their income. Wolaver, *supra* note 24, at 141-42.

[26] Tobey v. County of Bristol, 23 F. Cas. 1313, 1321 (C.C.D. Mass. 1845) (No. 14,065).

[27] 43 Stat. 883 (codified as amended at 9 U.S.C. §§ 1-14 (1982)). The FAA has analogues in most states, based on the Uniform Arbitration Act, 7 U.L.A. 5 (1985), formulated in 1955. *See* Note, *Arbitrability of Disputes Under the Federal Arbitration Act*, 71 IOWA L. REV. 1137, 1140 n.32 (1986) (identifying 45 state statutes that enforce arbitration agreements).

[28] Scherk v. Alberto-Culver Co., 417 U.S. 506, 510-11 (1974) (quoting H.R. REP. No. 96, 68th Cong., 1st Sess. 2 (1924)); *see also* Cohen & Dayton, *The New Federal Arbitration Law*, 12 VA. L. REV. 265, 274-78 (1926) (discussing the need for federal and state arbitration statutes).

[29] 9 U.S.C. §§ 1-2 (1982).

[30] Section 3 of the FAA provides for a stay of proceedings when a court encounters an arbitrable issue; § 4 authorizes federal courts that otherwise have subject matter jurisdiction to order parties to honor arbitration agreements. *See id.* §§ 3-4.

[31] *See* Sheet Metal Workers Int'l Ass'n Local Union No. 420 v. Kinney Air Conditioning Co., 756 F.2d 742, 745-46 (9th Cir. 1985); Trafalgar Shipping Co. v. International Milling Co., 401 F.2d 568, 572-73 (2d Cir. 1968). The statute sets forth the following grounds for overturning an award:

> (a) Where the award was procured by corruption, fraud, or undue means.
>
> (b) Where there was evident partiality or corruption in the arbitrators . . . .
>
> (c) Where the arbitrators were guilty of misconduct in . . . refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.
>
> (d) Where the arbitrators exceeded their powers . . . .

9 U.S.C. § 10 (1982).

Arbitration in federal programs provides one solution by reducing judicial case loads. Of course, statutory allocation of adjudicative responsibilities to administrative agencies relieves the courts of initial responsibility for vast numbers of cases.[35] Nevertheless, the courts retain a major supervisory role through routine judicial review of agency adjudications.[36] Shifting from agency adjudication to arbitration reduces this portion of judicial case loads, because review of arbitration is so limited. Congress can provide courts further relief by assigning to agencies those aspects of review that are high in volume and low in importance.[37] Therefore, the availability of arbitration in federal programs should appeal to a harried judiciary.

B. Contractual Values in the Federal Arbitration Act Cases

The Supreme Court has not articulated a general constitutional theory for allocating adjudicative responsibilities among the federal courts, state courts, federal agencies, and private deciders. In the FAA cases, however, the Court has allocated authority between the federal courts and either the state courts or the private sector, considering issues such as parties' consent to arbitration, the limits of arbitral expertise, the acceptability of arbitration of public policy issues, and the nature of judicial review of awards. Because these same issues arise in cases reviewing arbitration in federal programs, the FAA cases provide some guidance for these disputes as well.

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[32] *See infra* subpart II(B).

[33] *See, e.g.*, R. POSNER, THE FEDERAL COURTS: CRISIS AND REFORM 94-129 (1985) (reviewing the debilitating consequences of the "caseload explosion" in the federal courts); Baker & McFarland, *The Need for a New National Court*, 100 HARV. L. REV. 1400, 1410-14 (1987) (proposing a new court to relieve the Supreme Court's work load); Ginsburg & Huber, *The Intercircuit Committee*, 100 HARV. L. REV. 1417, 1426-28 (1987) (arguing that elevation of the law-clarifying functions of the Office of Law Revision Counsel would render a new court unnecessary).

[34] For example, the Supreme Court's administrative law doctrine may reflect an attempt to reduce judicial case loads. *See* Strauss, *One Hundred Fifty Cases per Year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of Agency Action*, 87 COLUM. L. REV. 1093, 1117-22 (1987).

[35] In 1984, there were 1121 administrative law judges (up from 196 in 1947), performing functions that could have been assigned to federal district judges. Lubbers, *Federal Agency Adjudications: Trying to See the Forest and the Trees*, 31 FED. B. NEWS & J. 383, 383 (1984). The Social Security Administration holds the largest number of these adjudications. *See* J. MASHAW, BUREAUCRATIC JUSTICE: MANAGING SOCIAL SECURITY DISABILITY CLAIMS 18-19, 196 (1983) (noting that the Social Security Administration decides approximately 1.3 million cases each year).

[36] For example, in 1983 there were 20,309 filings in district court for review of Social Security Administration decisions. R. POSNER, *supra* note 33, at 64.

[37] *See infra* notes 241-44 and accompanying text.

In recent FAA cases, the Court has emphasized the need to enforce agreements to arbitrate. This contractual value has repeatedly subordinated values that the Court ordinarily promotes, such as the efficient resolution of disputes. In *Dean Witter Reynolds, Inc. v. Byrd,*[38] for example, the Court compelled arbitration of the state-law portion of a securities dispute, even though the judgment severed pendent claims from a suit properly in federal court. Rejecting an argument that the FAA's sole purpose was to allow the speedy and efficient resolution of disputes, the Court concluded that the Act's principal objective was "to enforce agreements into which parties had entered."[39] Therefore, " 'federal law *requires* piecemeal resolution when necessary to give effect to an arbitration agreement.' "[40]

Federalism also yields to the contractual values embodied in the FAA. In *Perry v. Thomas,*[41] the Court held that the FAA preempted a California statute forbidding arbitration of wage disputes. The Act's " 'liberal federal policy favoring arbitration agreements . . . create[s] a body of federal substantive law of arbitrability.' "[42] The Court's interpretation of the FAA as displacing state policies, however, places a substantial gloss on the Act. Congress perhaps intended only to provide procedure in federal court suits.[43]

The Court's devotion to contract, as illustrated in *Byrd* and *Perry,* may reflect a desire to reduce federal dockets. Disputes forced into court by statutes such as that involved in *Perry* could often appear in federal court under diversity jurisdiction. Similarly, pendent jurisdiction could open federal courts to many state-law claims that might be resolved through arbitration. By emphasizing contractual values, the Court serves its own interest in reducing the federal judiciary's work load and requires the parties to absorb the inefficiencies of bifurcated disputes.

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[38] 470 U.S. 213, 218-21 (1985).

[39] *Id.* at 220.

[40] *Id.* at 221 (quoting Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 20 (1983)).

[41] 107 S. Ct. 2520, 2526-27 (1987).

[42] *Id.* at 2525 (quoting Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983)).

[43] *See* Southland Corp. v. Keating, 465 U.S. 1, 25-27 (1984) (O'Connor, J., dissenting); *see also* Hirshman, *supra* note 24, at 1313-18 (noting that Congress could have intended the FAA to be (1) only a procedural rule, (2) substantive law for cases in federal court, or (3) substantive law applicable in state and federal court).

The contractual value, however, also suggests an important limit to arbitration. Fearing that arbitrators will display insufficient sensitivity to the limits of consent to their authority, courts do not allow arbitrators to determine their own jurisdiction.[44] Instead, courts construe the underlying contracts, resolving doubts in favor of arbitrability.[45] In the related field of labor arbitration, the Court has explained that the judicial check on jurisdiction actually fosters arbitration by removing the disincentive to enter into arbitration agreements that might arise if arbitrators could decide jurisdiction limited only by their "'understanding and conscience.'"[46] The presumption favoring arbitrability also reflects the "greater institutional competence"[47] of arbitrators than courts in such matters as interpreting collective bargaining agreements.

C. *Enforcing Public Policy: Limits to Arbitrability*

Traditionally, courts frowned upon the notion that arbitrators should attempt to implement public policy through their decisions. Courts expected them to confine their attention to interpreting the parties' contracts. Two important cases involving arbitration in the securities industry, however, reveal a shift in the Supreme Court's willingness to allow arbitrators to enforce public policy norms.

In *Wilko v. Swan*,[48] the Court adopted the traditional view by holding that a customer's misrepresentation claims against brokers under the Securities Act of 1933[49] were not subject to compulsory arbitration, notwithstanding an agreement to arbitrate.[50] The Court concluded that a provision in the 1933 Act forbidding waiver of compliance with its requisites superseded the policies of the FAA. The Court feared that disparities in bargaining power between securities sellers and buyers could debase consent to arbitration. It concluded that, because of the "manifest disregard of the law" standard used by courts under the FAA, judicial review of arbitral awards was insufficient to protect the customer's statutory rights.[51]

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[44] In Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 403-04 (1967), the Court held that an arbitrator could decide a claim that a contract containing an agreement to arbitrate was induced by fraud, but not a claim that the agreement to arbitrate was tainted.

[45] *See* Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24-25 (1983). But this presumption of arbitrability, which arose in labor arbitration, does not extend to all contexts. *See* Schneider Moving & Storage v. Robbins, 466 U.S. 364, 371-72 (1984) (holding that presumption, designed to minimize strikes and promote labor peace, was not applicable to contract with trustee of benefit funds).

[46] AT&T Technologies v. Communications Workers, 475 U.S. 643, 651 (1986) (quoting Cox, *Reflections upon Labor Arbitration*, 72 HARV. L. REV. 1482, 1509 (1959)). Although the FAA does not apply to labor arbitration, the Court looks to it for "guidance," in light of the similarity of the two schemes. United Paperworkers Int'l Union v. Misco, Inc., 108 S. Ct. 364, 372 n.9 (1987).

[47] *AT&T Technologies*, 475 U.S. at 650; *see also* Pearce v. E.F. Hutton Group, 828 F.2d 826, 829 (D.C. Cir. 1987). In *Pearce*, the court observed that the rationale for the policy of resolving jurisdictional doubts in favor of arbitration "is at its strongest where the arbitration will be governed by procedures specifically tailored to the context from which the agreement to arbitrate arises, and will be conducted by arbitrators who are expert in the norms and practices of the relevant industry." *Id.*

[48] 346 U.S. 427 (1953).

[49] The claims were brought under § 12(2), 15 U.S.C. § 77l(2) (1982).

In *Shearson/American Express v. McMahon*,[52] the Court sharply limited *Wilko*.[53] The McMahons had signed customer agreement forms providing for arbitration of any controversy arising out of their accounts with Shearson.[54] They sued in district court, alleging fraudulent conduct and breach of fiduciary duties under the Securities Exchange Act of 1934[55] and the Racketeer Influenced and Corrupt Organizations Act (RICO).[56] The court of appeals held the claims nonarbitrable under both federal statutes.[57]

Reaffirming the contractual values that dominate recent FAA cases, the Court reversed the Second Circuit and upheld the enforceability of predispute arbitration agreements between brokerage firms and their customers. In a broadly phrased opinion for the majority, Justice O'Connor emphasized that the duty to enforce arbitration agreements "is not diminished"[58] for claims founded on statutory rights, absent a showing that arbitration "is inadequate to protect the substantive rights at issue."[59] Addressing the Securities Exchange Act issues, the *McMahon* Court characterized *Wilko* as an embodiment of traditional judicial suspicion of arbitration.[60] This attitude conflicted with more recent cases that both recognized the capability of arbitrators to resolve factual and legal complexities and acknowledged the sufficiency of judicial review to conform awards to statutory requirements. Indeed, since its decision in *Wilko*, the Court had twice enforced agreements to arbitrate statutory claims in international contracts.[61] Justice O'Connor also noted that Congress had given the Securities and Exchange Commission (SEC) the power to ensure the adequacy of the exchanges' arbitral procedures.[62] The Court confined *Wilko* to its holding under the 1933 Act.[63]

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[50] *Wilko*, 346 U.S. at 438. For discussions of *Wilko* and its aftermath, see Fletcher, *Privatizing Securities Disputes Through the Enforcement of Arbitration Agreements*, 71 MINN. L. REV. 393, 404-20 (1987) (analyzing the development of securities arbitration from 1953 to 1985); Kanowitz, *supra* note 25, at 257-61 (discussing conflicting policies in securities arbitration cases).

[51] .*Wilko*, 346 U.S. at 436-37.

[52] 107 S. Ct. 2332, 2338-39 (1987).

[53] In Noble v. Drexel, Burnham, Lambert, Inc., 823 F.2d 849, 851 (5th Cir. 1987), the court held that *McMahon* had retroactive application.

[54] *McMahon*, 107 S. Ct. at 2335.

[55] The claims were brought under § 10(b), 15 U.S.C. § 78j(b) (1982).

[56] 18 U.S.C. § 1961 (1982).

[57] McMahon v. Shearson/American Express, 788 F.2d 94, 96-97 (2d Cir. 1986), *rev'd*, 107 S. Ct. 2332 (1987). For the RICO claim, "public policy" considerations made arbitration inappropriate, because issues of public interest required a judicial forum. For the securities claims, the court felt bound by *Wilko*. *See id*. at 98-99.

[58] *McMahon*, 107 S. Ct. at 2337.

[59] *Id*. at 2339.

[60] *See id*. at 2341.

Proceeding to the RICO claims, the Court rejected the McMahons' argument that the combination of compensatory and policing purposes in the Act rendered arbitration inappropriate. The Court thought that the "'adaptability and access to expertise' characteristic of arbitration"[64] permitted satisfactory arbitral resolution of even these complex and important statutory claims. Accurate assessments of liability would yield an appropriate level of deterrence. Therefore, the Court upheld the parties' agreement to arbitrate.

In *McMahon*, the Court demonstrated its willingness to expand the category of rights that parties can agree to protect through arbitration. The extent of the Court's willingness to sanction such developments, however, is open to question, because the Court has held that certain federal statutes confer nonwaivable rights to judicial enforcement. In *McDonald v. City of West Branch*,[65] a former police officer went to arbitration, claiming that the department discharged him without "proper cause" and thereby violated a collective bargaining agreement. The officer lost the arbitration but later prevailed in a section 1983 suit, in which he alleged that the discharge abridged his first amendment rights of speech and association.[66] The Supreme Court refused to accord the arbitration any preclusive effect in the subsequent trial.[67] Drawing on earlier cases,[68] the Court held that arbitration "cannot provide an adequate substitute" for a trial in protecting federal statutory and constitutional rights under section 1983.[69]

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[61] *See* Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, 473 U.S. 614 (1985) (antitrust); Scherk v. Alberto-Culver Co., 417 U.S. 506 (1974) (trademark and securities). In both cases, however, the Court emphasized the special needs of parties to international contracts to select their fora.

[62] *McMahon*, 107 S. Ct. at 2341-42. Justices Blackmun, Brennan, and Marshall dissented, arguing that the majority had not shown SEC supervision of arbitration to be adequate to overcome the disparities in bargaining power that the securities acts were designed to redress. *See id.* at 2353-58 (Blackmun, J., dissenting). Earlier cases upholding securities arbitration had relied partly on SEC oversight. *See* Todd & Co. v. SEC, 557 F.2d 1008, 1012 (3d Cir. 1977); R.H. Johnson & Co. v. SEC, 198 F.2d 690, 695 (2d Cir.) (Frank, J.), *cert. denied*, 344 U.S. 855 (1952); *see also* Fletcher, *supra* note 50, at 452 n.384 (pointing out that the SEC's oversight of arbitration adequately protects investors in an investor/broker-dealer dispute, because the SEC has the power to change unfair exchange arbitration rules). *See generally* Katsoris, *The Arbitration of a Public Securities Dispute*, 53 FORDHAM L. REV. 279, 285-91 (1984) (discussing the development of securities arbitration and concluding that the arbitration process must become more centralized and independent, with greater public participation).

[63] *See McMahon*, 107 S. Ct. at 2341-43. In Schultz v. Robinson-Humphrey/American Express, 666 F. Supp. 219 (M.D. Ga. 1987), the court held that *McMahon* had not overruled *Wilko*. But in Rodriguez De Quijas v. Shearson/Lehman Bros., 845 F.2d 1296, 1298 (5th Cir. 1988), the court held that *McMahon* has so undermined *Wilko* that even § 12(2) claims, involved in *Wilko* itself, are now arbitrable.

[64] *McMahon*, 107 S. Ct. at 2344 (quoting *Mitsubishi*, 473 U.S. at 633).

[65] 466 U.S. 284, 286 (1984).

The *McDonald* Court gave four reasons for denying arbitration preclusive effect.[70] Each requires reappraisal in light of *McMahon*. Writing for the majority in *McDonald*, Justice Brennan began by quoting the maxim that an arbitrator's expertise " 'pertains primarily to the law of the shop, not the law of the land.' "[71] He thought that arbitrators, many of whom are not lawyers, might lack the expertise necessary to resolve complex legal questions. In contrast, *McMahon* recognized that arbitrators can have expertise in both the law of the shop *and* the law of the land. Similarly, Judge Edwards has stressed that the legal skills required to interpret statutes do not differ sharply from those required to interpret contracts.[72] This is not to say, however, that arbitrators should be able to act without guidance. Echoing *McDonald*'s concern, Edwards has suggested that although arbitrators can safely apply clearly defined rules of law, federal courts should articulate important public-law norms. Such an allocation of responsibilities might maximize the efficiency of the judiciary.[73] The absence of a bright line between lawmaking and law-applying will mean, of course, that new or broadly phrased statutes create norms that must be elaborated and applied at the same time.[74] These are not appropriate instances for judicial restraint, however, because under the Edwards formula, courts should defer only to arbitration that is confined to applying known statutory criteria.[75]

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[66] *Id.*

[67] *Id.* at 287-92. The Court earlier had held that the federal statute requiring full faith and credit for "judicial proceedings" in state courts, *see* 28 U.S.C. § 1738 (1982), does not apply to arbitration. Kremer v. Chemical Constr. Corp., 456 U.S. 461, 477 (1982).

[68] *See* Barrentine v. Arkansas-Best Freight Sys., 450 U.S. 728, 734 (1981) (holding that arbitration does not preclude suit to enforce minimum wage provisions of the Fair Labor Standards Act, 29 U.S.C. §§ 206(a), 254 (1982)); Alexander v. Gardner-Denver Co., 415 U.S. 36, 47 (1974) (holding that arbitration does not preclude suit under title VII); *see also* Carlisle, *Getting a Full Bite of the Apple: When Should the Doctrine of Issue Preclusion Make an Administrative or Arbitral Determination Binding in a Court of Law?*, 55 FORDHAM L. REV. 63, 77-84 (1986) (discussing New York case law giving arbitral issue determinations preclusive effect in state courts).

[69] *McDonald*, 466 U.S. at 292.

[70] The Court also noted that its holding might foster the informal resolution of grievances through arbitrations that would not occur if they precluded access to court. *Id.* at 292 n.11. Thus, even in *McDonald* the Court evinced some concern for federal case loads.

[71] *Id.* at 290 (quoting *Gardner-Denver*, 415 U.S. at 57).

[72] *See* Devine v. White, 697 F.2d 421, 438-39 (D.C. Cir. 1983) (Edwards, J.).

[73] Edwards, *Alternative Dispute Resolution: Panacea or Anathema?*, 99 HARV. L. REV. 668, 680 (1986).

[74] *See* Alexander v. Gardner-Denver Co., 415 U.S. 36, 57 (1974) (noting the "broad language" of title VII as a reason for denying arbitration preclusive effect).

As its second justification, the *McDonald* Court advanced the traditional view that an arbitrator's jurisdiction derives solely from the contract and does not include general authority to invoke public law that conflicts with contractual terms.[76] As *McMahon* illustrates, however, an arbitrator's charge can specifically require enforcement of public-law obligations.[77] Moreover, the Court has recently reaffirmed that arbitral awards may be set aside if they conflict with an "explicit" public policy—that is, one contained in "the laws and legal precedents" rather than "general considerations of supposed public interests."[78] Thus, arbitrators are now expected to recognize the supremacy of clearly defined public policy over contract.

The *McDonald* Court also thought that a union's acceptance of arbitration should not necessarily be imputed to its individual members.[79] Although shared interests make the union a reliable proxy for most economic issues, member interests are likely to diverge on issues of individual liberty.[80] Unlike labor arbitration, *McMahon* did not involve issues of adequacy of representation. Still, *McMahon* evinced concern that consent to arbitration be meaningful and found that concern satisfied by agency supervision of arbitral schemes.[81]

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[75] The ACUS disfavors voluntary arbitration in federal programs when precedent is to be set or when maintaining established norms is of "special importance." *See* 1 C.F.R. § 305.86-3 B.5.(b) (1988). The recommendation on mandatory arbitration contains a similar limitation for precedential effect and requires an ascertainable norm for decision, but it does not explicitly refer to cases involving the need to maintain norms. *See id.* § 305.86-3 C.8.

[76] Indeed, in cases of conflict, the arbitrator must enforce the contract or risk invalidation of the award. *See McDonald*, 466 U.S. at 290-91 (citing *Gardner-Denver*, 415 U.S. at 36, and United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960)).

[77] *See* Shearson/American Express v. McMahon, 107 S. Ct. 2332, 2343, 2345-56 (1987).

[78] United Paperworkers Int'l Union v. Misco, Inc., 108 S. Ct. 364, 373 (1987) (citing W.R. Grace & Co. v. Local Union 759, Int'l Union of the United Rubber, Cork, Linoleum & Plastic Workers, 461 U.S. 757 (1983)); *cf.* Iowa Elec. Light & Power Co. v. Local Union 204 of the Int'l Bhd. of Elec. Workers, 834 F.2d 1424, 1427 (8th Cir. 1987) (holding that award reinstating nuclear plant employee who committed serious violations of safety regulations violates public policy). *See generally* Sterk, *Enforceability of Agreements to Arbitrate: An Examination of the Public Policy Defense*, 2 CARDOZO L. REV. 481, 486 (1981) (arguing that public policy should prevent enforcement of arbitration agreements only in very limited circumstances determined by statute or other legal rules).

[79] *McDonald*, 466 U.S. at 291.

[80] *See* Alexander v. Gardner-Denver Co., 415 U.S. 36, 51 (1974); *see also* Barrentine v. Arkansas-Best Freight Sys., 450 U.S. 728, 742 (1981) (concluding that unions are not reliable representatives for some statutory guarantees of individual economic entitlement). The Court has adhered to the view that certain statutory rights for employees are not subject to compulsory arbitration. *See, e.g.*, Lingle v. Norge Div. of Magic Chef, 108 S. Ct. 1877, 1883 (1988) (holding that state-law claims can be resolved independently of a collective bargaining agreement, provided that claim does not require interpretation of the agreement); Atchison, T. & S.F. Ry. v. Buell, 480 U.S. 557, 564-67 (1987) (holding that a worker's Federal Employer's Liability Act claim for personal injuries could not be subject to compulsory arbitration under the Railway Labor Act, 45 U.S.C. §§ 151-159 (1982)); *cf.* Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1078-82 (1984) (expressing concerns about the adequacy of union representation in settlements).

Finally, the *McDonald* Court observed that arbitral fact-findin not the equivalent of judicial fact-finding, because of the informalit arbitral processes.[82] The "reasons" for this conclusion merely desc the ways in which arbitration usually deviates from trial processe The Court's unarticulated concern may have been that the arbitratio civil rights or constitutional issues threatens core judicial responsit ties.[84] The *McMahon* decision did not address this issue, but in consti tional litigation generally, the Court exercises relatively independ review of the facts found below.[85] Arbitration, on the other hand, lea fact determinations in the hands of the arbitrator and, because of absence of a detailed record, disables intensive fact review.

Perhaps, then, arbitration should never be used in constitutional civil rights controversies, even when the governing norm is clear. Suc limitation, however, threatens to sweep too broadly. Some prisone grievances, for example, might be better resolved through arbitrati than through federal court litigation.[86] Yet prisoners prove astute converting their grievances into constitutional claims,[87] and they mig successfully manipulate this limitation to avoid arbitration. Th although the presence of a colorable constitutional claim identifies sit tions in which courts are likely to treat federal court enforcement mandatory, no categorical distinction seems appropriate.

D. Summary

Arbitration in federal programs can draw several lessons from co mercial and labor arbitration. First, agency oversight can allay concer that unequal bargaining power between private parties undermines th consent to arbitration.[88] Second, arbitrators can apply clearly defin public policy norms. Finally, review by a government entity, such as court, is needed both to identify arbitrable issues in case of dispute and to conform awards to the law. For arbitration in federal programs, however, the traditional "manifest disregard of the law" standard is too relaxed.[89] This standard reflects its originating context in contractual, private law.[90] Although the arbitral process is not suited to ordinary appellate review, it is feasible to require enough explanation of the basis of an award to allow review for facial violation of a governing public-law norm.[91]

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[81] *See McMahon*, 107 S. Ct. at 2356.

[82] *McDonald*, 466 U.S. at 291.

[83] *See Gardner-Denver*, 415 U.S. at 57-58.

[84] The *Gardner-Denver* Court emphasized that "the resolution of statutory or constitutio issues is a primary responsibility of courts." *Id.* at 57.

[85] *See* Monaghan, *Constitutional Fact Review*, 85 COLUM. L. REV. 229, 254-63 (1985) (anal ing the scope of judicial review of fact issues underlying constitutional claims).

[86] *See* Goldfarb & Singer, *Redressing Prisoners' Grievances*, 39 GEO. WASH. L. REV. 175, 3 16 (1970); Keating, *Arbitration of Inmate Grievances*, 30 ARB. J. 177, 190 (1975).

[87] *See, e.g.*, Parratt v. Taylor, 451 U.S. 527 (1981) (holding that negligent loss of a hobby was a constitutional deprivation of property), *overruled*, Daniels v. Williams, 474 U.S. 327, (1986).

[88] *See* Cohen v. Wedbush, Noble, Cooke, Inc., 841 F.2d 282, 286 (9th Cir. 1988) (rely partly on the existence of SEC supervision in rejecting claims that brokerage agreements to arbitr are unconscionable contracts of adhesion).

The commercial and labor arbitration cases consider one aspect of the boundary between public and private decision making. But arbitration in federal programs, because of its nexus with public policy making, raises broader issues. Part III introduces a general frame of reference identifying activities that must be kept within government or defining relationships that public officials must have with private deciders to whom they delegate power.

III. Delegation to Private Parties in American Law

Questions about the permissibility of placing governmental power in private hands occur throughout American law.[92] Unfortunately, courts tend to make broad statements that are inconsistent with both theory and practice and that hamper analysis of "delegation to private parties." A brief survey of the public/private distinction illustrates this point and guides further analysis.

A. The Delegation Doctrine

The Supreme Court has occasionally considered the permissibility of delegations to private parties. The most prominent case is *Carter v. Carter Coal Co.*,[93] in which the Court invalidated a federal statute that

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[89] *See* Brunet, *Questioning the Quality of Alternate Dispute Resolution*, 62 TUL. L. REV. 1, 28 (1987) (noting that the "manifest disregard" standard generally does not allow setting aside awards for "mere mistaken legal interpretations").

[90] *See, e.g.*, United Paperworkers Int'l Union v. Misco, Inc., 108 S. Ct. 364, 370 (1987):

> Because the parties have contracted to have disputes settled by an arbitrator chosen by them rather than by a judge, it is the arbitrator's view of the facts and of the meaning of the contract that they have agreed to accept. Courts thus do not sit to hear claims of factual or legal error by an arbitrator as an appellate court does in reviewing decisions of lower courts.

[91] *See, e.g.*, Galt v. Libbey-Owens-Ford Glass Co., 397 F.2d 439, 442 (7th Cir. 1968) (encouraging district court to ask arbitrators to explain the basis of their award); Sargent v. Paine Webber, Jackson & Curtis, Inc., 674 F. Supp. 920, 923 (D.D.C. 1987) (vacating arbitral award and remanding to arbitration panel for explanation as to how damages were computed).

[92] For a comprehensive review, see Liebmann, *Delegation to Private Parties in American Constitutional Law*, 50 IND. L.J. 650 (1975).

[93] 298 U.S. 238, 311 (1936).

allowed a majority of miners in cooperation with the producers of
thirds of the annual tonnage of coal to set maximum hours and minir
wages for the industry:

> The power conferred upon the majority is, in effect, the power to regulate the affairs of an unwilling minority. This is legislative delegation in its most obnoxious form; for it is not even delegation to an official or an official body, presumptively disinterested, but to private persons whose interests may be and often are adverse to the interests of others in the same business.[94]

The Court announced an absolute principle condemning delegation
interested private deciders to regulate others: "[I]n the very natur
things, one person may not be entrusted with the power to regulate
business of another, and especially of a competitor."[95] Although its r
oric suggests reliance on the delegation doctrine, the Court held the s
ute invalid because it denied the miners and producers in the mino
due process.[96]

The Court had earlier considered the delegation doctrine in *A.L*
Schechter Poultry Corp. v. United States.[97] In that case, the Court o
turned the portion of the National Industrial Recovery Act (NIRA) t
authorized the President to approve industry-generated codes of
competition. The majority asked whether "it be seriously contended t
Congress could delegate its legislative authority to trade . . . groups s
to empower them to enact the laws they deem to be wise and benefic
for . . . their trade or industries?"[98] Such a delegation of legisla
power, the Court continued, "is unknown to our law and is utterly inc
sistent with the constitutional prerogatives and duties of Congress."[99]
rejecting the grant of authority, however, the Court stressed the brea
of the field within which the President and the code drafters co
roam[100] rather than the potential for interested private decisions to
rubber-stamped by busy bureaucrats—though the Court was well aw
that chaos pervaded the National Recovery Administration.[101]

The *Schechter Poultry* Court failed to distinguish clearly betw
three possible grounds for objecting to the NIRA: that the delegat
was too broad to be exercised by *anyone*, that government should h
retained discretion granted to private parties, or that government sup

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[94] *Id.*

[95] *Id.*

[96] *Id.* at 310-12.

[97] 295 U.S. 495 (1935).

[98] *Id.* at 537.

[99] *Id.*

[100] *Id.* at 538-39, 541-42.

[101] *See* L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 61-62 (1965).

vision of private decision making was insufficient. Any of these objections could be called a violation of the Constitution's grant of legislative powers to Congress, but they have different implications.

Both *Schechter Poultry* and *Carter Coal* inveigh against the delegation of legislative powers to private actors. Notwithstanding the New Deal Court's confident dicta, the path of the case law wavers. In early cases, the Court sometimes struck down land-use regulations authorizing groups of property owners to control some uses of their neighbors' property.[102] Yet the Court has repeatedly upheld delegations of power to interested private persons, allowing Congress to condition the operation of regulatory schemes on their granting or withholding of consent.[103] For example, the issuance of federal milk marketing orders, which regulate prices, depends on the consent of dairy farmers and milk handlers.[104] The Court's efforts to distinguish the issues and resolve inconsistencies in the cases have been very weak.[105] It can be said, however, that delegations to interested private deciders are in jeopardy, even if *Carter Coal* and *Schechter Poultry* overstate the prohibition. The inquiry must widen in order to derive additional guidance and to explain the absence of a rule that all private delegations are unconstitutional.

102. *See, e.g.*, Washington *ex rel.* Seattle Title Trust Co. v. Roberge, 278 U.S. 116, 121-23 (1928) (striking down zoning ordinance that required permission from surrounding property owners prior to erecting a home for the aged); Eubank v. City of Richmond, 226 U.S. 137, 143-44 (1912) (striking down ordinance that authorized adjoining property owners to establish building line before the erection of a new building). *But see* Thomas Cusack Co. v. City of Chicago, 242 U.S. 526, 529-30 (1917) (upholding such a limitation). For an example of a modern court struggling with the Court's distinctions, see Silverman v. Barry, 845 F.2d 1072, 1086-87 (D.C. Cir. 1988).

103. *See, e.g.*, New Motor Vehicle Bd. v. Orrin W. Fox Co., 439 U.S. 96, 108-09 (1978) (upholding statute requiring an automobile manufacturer to obtain state approval before operating a dealership if an existing franchisee objected); H.P. Hood & Sons v. United States, 307 U.S. 588, 595 (1939) (upholding equalization provisions of the Agricultural Marketing Agreement Act, 7 U.S.C. § 608c (1982 & Supp. IV 1986), which fixed minimum producer prices on milk after agreement by at least two-thirds of the milk producers); United States v. Rock Royal Co-op., 307 U.S. 533, 577-78 (1939) (upholding provision of the Agricultural Marketing Agreement Act allowing vote of two-thirds of producers to be sufficient for issuing certain government orders); Currin v. Wallace, 306 U.S. 1, 15-16 (1939) (upholding Tobacco Inspection Act, 7 U.S.C. § 511 (1982 & Supp. IV 1986), which withheld regulation of a market unless two-thirds of the voting growers favored it). For a critique of the *Fox* case, see Mashaw, *Constitutional Deregulation: Notes Toward a Public, Public Law*, 54 TUL. L. REV. 849, 854-57, 870-75 (1980).

104. In Block v. Community Nutrition Inst., 467 U.S. 340, 345-48, 352 (1984), the Court held that this statutory scheme impliedly precluded judicial review at the behest of consumers. The Court assumed the validity of the statute, which had been upheld in *Rock Royal* and *H.P. Hood*, and, indeed, confirmed the power of the producers and handlers through its preclusion holding. *See* Easterbrook, *The Supreme Court, 1983 Term—Foreword: The Court and the Economic System*, 98 HARV. L. REV. 4, 49-50 (1984).

105. *See* Jaffe, *Law Making by Private Groups*, 51 HARV. L. REV. 201, 221-34 (1937) (attempting to sort out irregularities in the Court's decisions); Liebmann, *supra* note 92, at 655-61 (concluding that the Court's doctrine is "nonsense").

B. The Public/Private Distinction

1. The Impossibility of a Clear Boundary Between Public and Private Activity.—The boundary of the public sector in American life has never been distinct.[106] Our history has not produced any clear tradition allocating some functions to government and others to the private sphere, from which a positive theory of government might be drawn.[107] Nor has any satisfactory normative theory emerged.[108] Scholars, businessmen, and government officials still disagree over the appropriate scope of the public sphere.

This uncertainty has not prevented groups from calling for "privatization" of many government functions, in hopes of obtaining private sector efficiencies.[109] Congress has created public/private hybrids in the form of statutory corporations, such as the Tennessee Valley Authority, the United States Postal Service, and Amtrak, that perform many important functions.[110] Controversy surrounds the constitutionality of the Federal Open Market Committee (FOMC), a blend of public and private individuals that forms and executes the nation's monetary policy.[111]

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[106] *See* Horwitz, *The History of the Public/Private Distinction*, 130 U. PA. L. REV. 1423, 1426-27 (1982) (discussing twentieth-century debates on the public/private distinction).

[107] *See* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 543-47 (1985) (stressing the unworkability of any attempt to identify "traditional government functions" for tenth amendment purposes).

[108] *See generally The Public/Private Distinction*, 130 U. PA. L. REV. 1289 (1982) (surveying divergent points of view on the role of government). For a cogent summary of normative theories and their limits, see Steiner, *Public Expenditure Budgeting*, in THE ECONOMICS OF PUBLIC FINANCE 241, 248-57 (Brookings Inst. 1974).

[109] *See, e.g.*, S. BUTLER, PRIVATIZING FEDERAL SPENDING: A STRATEGY TO ELIMINATE THE DEFICIT 32-33 (1985) (stating that federal spending should be privatized because constituency pressures force legislators to support higher federal spending); E. SAVAS, PRIVATIZING THE PUBLIC SECTOR 89-93 (1982) (stating that many government sources can be "contracted out," which would heighten efficiency); Kolderie, *The Two Different Concepts of Privatization*, 46 PUB. ADMIN. REV. 285, 288 (1986) (arguing that competition should reduce the "unit costs" of many government functions). For further commentary on the issue of privatization, see *Privatization: The Assumptions and the Implications*, 71 MARQ. L. REV. 445 (1988), and *Overview: Perspectives on Privatization and the Public Interest*, 6 YALE L. & POL'Y REV. 1 (1988).

[110] *See* Tierney, *Government Corporations and Managing the Public's Business*, 99 POL. SCI. Q. 73, 75 (1984).

[111] In Melcher v. Federal Open Mkt. Comm., 644 F. Supp. 510 (D.D.C. 1986), *aff'd*, 836 F.2d 561 (D.C. Cir. 1987), *cert. denied*, 108 S. Ct. 2034 (1988), a district court upheld the constitutionality of the FOMC. The court noted that the private members do not have the "decisive voice" in policy making, because the Board of Governors of the Federal Reserve System holds a majority. *Id.* at 523 & n.26. The court also distinguished the coercive functions of government from monetary policy making and noted that the FOMC exercises no direct governmental authority. *Id.* at 523 n.26. Conceding the importance of monetary policy, the court observed that many private institutions also greatly affect the nation's economy. *Id.* at 520-22. Finally, the court relied partly on tradition—a combination of public and private decision makers have formulated monetary policy since the days of the Bank of the United States. *Id.* at 521-22. The court of appeals vacated the district court opinion on standing grounds, without reaching the merits. Melcher v. Federal Open Mkt. Comm., 836 F.2d 561, 565 (D.C. Cir. 1987), *cert. denied*, 108 S. Ct. 2034 (1988).

Faced with great difficulties in categorization, analysts often retreat to the notoriously conclusory distinction between inherently "governmental" functions, which must be kept in official hands, and "proprietary" functions, which may be exercised privately.[112] In identifying administrative functions that private contractors may perform, for example, the President's Office of Management and Budget (OMB) says merely that government employees must continue to perform "those activities which require either the exercise of discretion in applying Government authority or the use of value judgment in making decisions for the Government."[113] Such statements, of course, provide no useful guidance, and it thus remains unclear which activities are properly subject to privatization.

The difficulties in defining what functions must be public are matched by difficulties in deciding when formally private actions become legally public for some purposes. In identifying those relationships between private institutions and the state that invoke constitutional restrictions on "state action," the Supreme Court has refused to characterize private activity as state action, notwithstanding substantial public financial support and close regulation.[114] Instead, the Court looks for direct state coercion or encouragement of the particular decision in question. Given the pervasiveness of government regulation and subsidy in modern life, a test that looks only for government entanglement would risk ensnaring the private sector in the legal restraints that apply to government. The Court's analysis, however, does little to clarify which private delegations are constitutionally improper.

These uncertainties about the public/private boundary occur partly because private influence permeates even formal, public decision making.[115] Traditional views of government as the neutral and expert elaboration of the public's will have given way to theories that reco try to control private influences.[116] Current theories of legisl phasize its capacity to provide not only "public goods" for all "private goods" for special interests.[117] Controversy surround tent to which courts should try to offset this tendency.[118]

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[112] *See* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 539 (1985) (describing the difficult task of finding a principled distinction between private and governmental functions); Wells & Hellerstein, *The Governmental-Proprietary Distinction in Constitutional Law*, 66 Va. L. Rev. 1073, 1075-78 (1980) (describing this "distinction" as a cluster of rules whose purposes courts have not articulated carefully).

[113] OMB Circular No. A-76 (Revised) § 6e (Aug. 4, 1983); *see also* Note, *Privatization and the Reagan Administration: Ideology and Application*, 6 Yale L. & Pol'y Rev. 229, 232-50 (1988).

[114] *See, e.g.*, Blum v. Yaretsky, 457 U.S. 991, 1003-12 (1982) (finding no state action by a regulated private nursing home because the state was not responsible for the specific conduct in the complaint); Rendell-Baker v. Kohn, 457 U.S. 830, 839-42 (1982) (finding no state action by private school that accepted public funds but operated free of state regulation or compulsion); Jackson v. Metropolitan Edison Co., 419 U.S. 345, 349-59 (1974) (finding no state action by an exclusively licensed and heavily regulated utility because its conduct was not sufficiently connected to the state); *see also* Cass, *Privatization: Politics, Law, and Theory*, 71 Marq. L. Rev. 449, 502-08 (1988) (explaining that courts have been reluctant to extend "special inhibitions on public activity" to private actions, except possibly with regard to racial discrimination).

[115] *See* T. Lowi, The End of Liberalism: Ideology, Policy, and the Crisis of Public

Similarly, administrative law recently experienced the ascer an interest representation theory of policy making.[119] Competi of the administrative process emphasize the opportunity— duty—of administrators to seek their best conceptions of the put est, although private pressures may constrain decisions.[120] To public-regarding policy, modern administrative law relies on and controlling the oversight activities of all three branches o ment.[121] But shifting decision making from public to private h ates these monitoring devices. For a delegation to survi substitutes must tolerably conform private decision to the public

2. *The Public Uses of Private Interest.*—Many "private rangements bind unconsenting persons and are to that extent "p effect. Ancient doctrines of property and contract allow privat to make law, for example, by imposing restrictive covenants Similarly, government often authorizes private groups to exert powers. One prominent illustration is the collective bargainin ment, by which a majority of workers in a bargaining unit select

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AUTHORITY 298-99 (1969) (arguing that positive government power has been distrib interest groups to the detriment of the general public interest).

[116] For a recent summary and critique of these theoretical developments, see Fitts, *Virtue: A Political Party Perspective on Civic Virtue Reforms of the Legislative Process*, 1 REV. 1567 (1988).

[117] *See, e.g.*, Aranson, Gellhorn & Robinson, *A Theory of Legislative Delegation*, L. REV. 1, 37-52 (1982) (describing Congress as the primary agent responsible for ge production of private benefits and agencies as facilitating the regulatory production of su

[118] *Compare* Macey, *Promoting Public-Regarding Legislation Through Statutory In An Interest Group Model*, 86 COLUM. L. REV. 223, 240-56 (1986) (arguing that the "pu ing" Constitution permits judges to regulate special interest groups by applying tradition interpretation to impose subtle pressures on Congress and to exact costs from more sel *with* Posner, *Economics, Politics, and the Reading of Statutes and the Constitution*, 49 REV. 263, 290-91 (1982) (applying economic theory to view courts primarily as agents disposed to oppose legislation benefiting special interests because statutory amendment courts' policy-making interpretations).

[119] *See generally* Stewart, *The Reformation of American Administrative Law*, 88 REV. 1669, 1760-1802 (1975) (describing the political modes of interest representation in tive law).

[120] *See, e.g.*, Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. RE (1985) (advocating a "Madisonian" approach whereby administrators "maximize aggre as defined by "reference to public desires").

[121] *See generally* Bruff, *Legislative Formality, Administrative Rationality*, 63 TE 207, 229-44 (1984) (reviewing external sources of influence on agency decision making

sentative who may bind them all.[122] Another is the formation of special taxing districts by petition of some residents in a territory, against the wishes of the others.[123]

Analysis of these examples reveals justifications for private delegations that the *Carter Coal* Court did not perceive. Because of market-based incentives, decisions of private groups may be acceptable as proxies for more widely shared interests.[124] In *Carter Coal*, if all workers in the industry had similar interests in higher wages and all companies had similar interests in lower ones, the outcome of bargaining by a subset of both groups might have been fair within the industry.[125] Also, shared interests within a group may promote the fairness of self-regulation. A premise of collective bargaining is that whatever their internal disagreements, workers derive net advantages from negotiating as a group with management.[126]

In these shared-interest delegations, the creation of a small "government" promotes fairness. Such an entity makes a series of decisions that will not predictably advantage any particular participant. But this justification, which can be offered for entities as diverse as water districts, collective bargaining units, and homeowners' associations, does not apply to single-decision delegations. Therefore, whether this reasoning supports the use of arbitration in government programs depends on the presence or absence of repeat players. Interest arbitration of a labor contract between an agency and its employees, for example, could openly consider distribution issues ("How well did the union do last time around?") that would be out of place in the arbitration of an individual's Medicare claim.

Courts often uphold private delegations when the private deciders share interests with the general public. Thus, effective self-regulation by securities exchanges serves to maintain the public confidence on which the exchanges depend for their business. Clear boundaries to these private delegations do not always exist—consider government regulation by agencies staffed by members of regulated professional groups.[127] These situations present informational advantages: doctors can assess the sufficiency of medical training, and the state bar understands the pressures that lawyers face. Of course, the danger remains that shared group interests will subordinate the interests held in common with the public. But these concerns only suggest that such delegations should be controlled rather than avoided; the results may be imperfect, but so are the alternatives.

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[122] *See, e.g.*, Switchmen's Union v. National Mediation Bd., 320 U.S. 297, 300 (1943) (holding that the National Mediation Board's certification of a collective bargaining representative, elected by a majority of workers, was not subject to judicial review under the Railway Labor Act).

[123] *See* Liebmann, *supra* note 92, at 672-75 (commenting that imposition of judicial checks on local taxing districts seems inappropriate).

[124] *See* Gillette, *Who Puts the Public in the Public Good?: A Comment on Cass*, 71 MARQ. L. REV. 534, 538-39 (1988) (suggesting that permissibility of delegation should depend on the sufficiency of either political accountability or market forces to give delegate incentives to consider all affected interests).

[125] Jaffe, *supra* note 105, at 249-50. Of course, this conclusion would depend on the nature of bargaining power in the industry, but the *Carter Coal* Court failed to reach any such empirical question.

[126] *Id*. at 235.

One possible public control is a standard to which the delegate must conform. Standards, however, help only when the decisions are amenable to them. A test of industrial bargaining power, as in *Carter Coal*, may not admit of a standard, although grievance arbitration under a resulting contract presupposes one. For standards to be effective, some government entity must check the delegate's compliance.[128] In *Schechter Poultry*, the statute contained criteria for the President's approval of privately drafted codes—for example, that the private groups be truly representative of the industry.[129] Although these standards may have sufficed for facial validity of the private delegation, the adequacy of the President's discharge of his monitoring duties pursuant to them raised an entirely different question.

As *Schechter Poultry* illustrates, the importance of asking whether government supervision is real or merely nominal is greatest when formally public action has dominant private aspects. For example, statutes sometimes authorize agencies to transform private industry standards into government regulations.[130] Federal judges also enforce consent agreements in public-law litigation, as negotiated by private parties.[131] Whether adequate public control exists for such delegated powers depends on both the selection of the governmental monitor and the articulation of its role; these decisions depend on the structure of a particular program.

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[127] *See* United Farm Workers v. Arizona Agric. Employment Relations Bd., 727 F.2d 1475, 1479-80 (9th Cir. 1984) (upholding constitutionality of a statute requiring interest-group representation on a regulatory body).

[128] Jaffe, *supra* note 105, at 249-51.

[129] *See* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 521-23 (1935).

[130] *See* Hamilton, *The Role of Nongovernmental Standards in the Development of Mandatory Federal Standards Affecting Safety or Health*, 56 TEXAS L. REV. 1329, 1450-51 (1978); *see also* Allied Tube & Conduct Corp. v. Indian Head, Inc., 108 S. Ct. 1931, 1937-38 (1988) (noting that private standards-setting organizations are not "governmental" for purposes of antitrust immunity, even though governments often adopt their standards). *See generally* R. DIXON, STANDARDS DEVELOPMENT IN THE PRIVATE SECTOR: THOUGHTS ON INTEREST REPRESENTATION AND PROCEDURAL FAIRNESS (1978).

[131] Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1298-1302 (1976).

IV. An Approach to the Constitutional Issues

Several principles guide the analysis of the constitutionality of arbitration in federal programs. First, as the preceding survey of the public/private boundary suggests,[132] the optimal specificity of constitutional rules that regulate the organization of government is low.[133] The size and diversity of government and the use of arbitration in a wide range of programs means that no single set of detailed constitutional criteria can readily be crafted to fit them all. Moreover, predicting the effects of rules on institutions is hazardous, even in the short run. Arbitration in government is still experimental; courts should not shackle evolving procedures with rigid constitutional doctrine.

Second, courts should defer to administrative or legislative choice of procedure, whether the issue is statutory authorization[134] or constitutionality.[135] The acceptability of a procedure is a function of the particular issues to be decided,[136] and both Congress and administrative agencies are capable of evaluating the factors relevant to choosing a procedure.

Finally, as the "private delegation" cases demonstrate, powers granted to private deciders must be structured so that both internal incentives and outside supervision conform their decisions to the public interest.[137] This judgment is necessarily specific to each particular program.

The remainder of this Article employs separation of powers analysis to determine the consistency of government arbitration with articles II and III of the Constitution. Here a fundamental distinction must be made to understand the cases. Separation of powers cases involving the aggrandizement of one branch at the expense of another present greater problems than those posing only a possible interference with the prerogatives of one branch.[138] In the aggrandizement cases, the Court favors a formalist approach that reasons logically from the constitutional text and what is known about the framers' intentions.[139] The Court consequently draws relatively bright lines between the functions of the branches. In the interference cases, the Court uses a functional approach that evaluates the impairment of a branch's core responsibilities.[140]

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[132] *See supra* section III(B)(1).

[133] Bruff, *On the Constitutional Status of the Administrative Agencies*, 36 AM. U.L. REV. 491, 493-94 (1987).

[134] *See* Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, 435 U.S. 519, 524-25 (1978).

[135] *See* Mathews v. Eldridge, 424 U.S. 319, 349 (1976).

[136] *See* Robinson, *The Making of Administrative Policy: Another Look at Rulemaking and Adjudication and Administrative Procedure Reform*, 118 U. PA. L. REV. 485, 536-37 (1970).

[137] *See supra* section III(B)(2).

[138] *See* Strauss, *Formal and Functional Approaches to Separation-of-Powers Questions—A Foolish Inconsistency?*, 72 CORNELL L. REV. 488, 517-26 (1987).

[139] *See, e.g.*, Bowsher v. Synar, 478 U.S. 714, 721-27 (1986) (forbidding an officer removable by

These two doctrinal approaches reflect their underlying values. In cases addressing the relations of the constitutional branches *inter se*, formalism offers the advantages of preserving clear lines of political accountability and of minimizing evasions of constitutional strictures.[141] For the organization of the "fourth branch" of the bureaucracy, however, formalism's simplicities would not permit the complexity that administrative structure requires. The Court accordingly shifts to a functional inquiry that evaluates the overall relationships between the constitutional branches and the agencies.[142] The functional test is far more permissive of diverse government structure than is formalism. It is well suited to conforming arbitration in federal programs to the values embodied in both articles II and III of the Constitution, as the following analysis demonstrates.

V. Granting Judicial Power to Agencies and Arbitrators

To what extent may adjudicative authority that could be assigned to the federal courts be placed in other hands, including those of arbitrators? Article III creates the "judicial Power of the United States," but the federal courts are not its sole repository.[143] State courts also decide federal questions and cases within federal diversity jurisdiction.[144] This distribution of business results partly from Congress's disinclination to vest exclusive jurisdiction in the federal courts and partly from parties' selection of state courts. The FAA also shifts business away from the federal courts by fostering the use of private arbitrators for many cases

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Congress from exercising executive functions); INS v. Chadha, 462 U.S. 919, 951-59 (1983) (invalidating legislative vetoes as equivalent to legislation that evades article I strictures).

[140] *See, e.g.*, Morrison v. Olson, 108 S. Ct. 2597, 2608-09, 2621 (1988) (upholding the vesting of prosecutorial functions in an independent counsel partially insulated from executive supervision); Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 850-54 (1986) (declining to adopt formalistic rules to determine when Congress impermissibly threatens the integrity of the judiciary); Nixon v. Administrator of Gen. Servs., 433 U.S. 425, 441-46 (1977) (rejecting an "airtight" separation of powers in favor of a flexible assessment of the extent to which a statute prevents the executive branch from accomplishing its constitutionally assigned functions).

[141] *See generally* Bruff, *supra* note 133, at 506-09 (arguing that formalism may rest on a judgment that the executive branch should be solely responsible for administration).

[142] *See* Strauss, *supra* note 4, at 667-68.

[143] *See* Crowell v. Benson, 285 U.S. 22, 86-87 (1932) (Brandeis, J., dissenting). For an overview of the issues discussed in this Part, see Fallon, *Of Legislative Courts, Administrative Agencies, and Article III*, 101 HARV. L. REV. 915 (1988).

[144] Indeed, state courts have always carried part of the federal work load. Congress did not grant general federal question jurisdiction to the lower federal courts until 1875. *See* F. FRANKFURTER & J. LANDIS, THE BUSINESS OF THE SUPREME COURT 65 (1928).

within the federal judicial power. Not surprisingly, clear limits to congressional power over federal jurisdiction have never emerged, resulting in confusion over limits in particular contexts.[145]

A. Delegation of Adjudicative Power in Administrative Law

Even within the federal government, no obvious theory underlies the distribution of adjudicative business among the available fora. Variations appear in both institutional characteristics and procedural formality. The catalogue includes article III district courts, article III adjuncts (such as bankruptcy courts), "legislative" courts (such as the Tax Court), administrative agencies employing the full adjudicative procedures of the Administrative Procedure Act (APA),[146] and agencies employing more informal procedures.[147] The last category, informal executive adjudication, includes much case-by-case decision making.[148] Hence it includes a vast number and range of decisions, such as personnel promotions and contract awards. Agencies often conduct this adjudication without any statutorily specified procedure, but in many instances the results are subject to meaningful judicial review.[149]

The federal courts could conceivably adjudicate many of these kinds of cases under federal question jurisdiction, but a vastly bloated judiciary and an equally shrunken executive would result. More importantly, some functionally adjudicative activities are "executive" in the constitutional sense and may not be transferred to the courts. An obvious example is the President's exercise of law-applying judgment pursuant to responsibilities conferred on him by the Constitution or by statute.[150] On a more mundane level, the Supreme Court, in delineating the boundary between legislative and executive responsibilities, has noted that "[i]nterpreting a law enacted by Congress to implement the legislative mandate is the very essence of 'execution' of the law."[151] Yet this definition also describes a principal activity of the federal courts.[152] Plainly, a simple formalist distinction will not suffice for separation of powers purposes.[153]

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[145] *See* Sager, *The Supreme Court, 1980 Term—Foreword: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts*, 95 Harv. L. Rev. 17, 19-20 (1981) (finding "no more than a glimmer of consensus" on such limits).

[146] 5 U.S.C. §§ 554-557 (1982).

[147] *See* Lubbers, *supra* note 35, at 387 (listing informal procedures).

[148] Chief Justice Marshall perceived this problem in 1833:

> That [a Treasury officer's setting of the amount of a duty] may be, in an enlarged sense, a judicial act, must be admitted . . . . In this sense the act of the President in calling out the militia under [a statute] or of a commissioner who makes a certificate for the extradition of a criminal, under a treaty, is judicial.

Ex parte Randolph, 20 F. Cas. 242, 254 (C.C.D. Va. 1833) (No. 11,558).

[149] The Supreme Court mandated such review in Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 420 (1971).

[150] *See* Bruff, *Judicial Review and the President's Statutory Powers*, 68 Va. L. Rev. 1, 17-18 (1982).

[151] Bowsher v. Synar, 478 U.S. 714, 733 (1986).

The Court has struggled to identify adjudicative functions that *must* remain in federal courts, those that *may* be placed in the executive, and those that *must* be placed in the executive.[154] Despite these uncertainties, the legitimacy of administrative adjudication bears on the constitutionality of arbitration in federal programs. Theories that justify transferring judicial power to agencies may also provide support for the further step of delegating it to arbitrators.

In administrative law, analysis of agency adjudication usually begins with the relatively formal model for which the APA provides a code of procedure. The trier of fact is an administrative law judge (ALJ), and the agency performs appellate-style review of the ALJ's decision. This discussion reviews the Supreme Court's analysis of this decision-making model, noting variations explicitly.

Crowell v. Benson[155] established the constitutionality of delegating adjudicative power to administrative agencies. Congress had created a workers' compensation scheme for longshoremen and had authorized an agency to decide claims under procedures resembling those later codified in the APA.[156] The Court rejected a due process assault on administrative fact-finding, because judicial review could assure the presence of substantial evidence for the award.[157] Article III did not require that the subject matter, which was within the federal judicial power, be allocated to the courts. It sufficed that reviewing courts retained power to decide issues of law.[158] The Court did hold, however, that courts must perform independent review of issues of constitutional or jurisdictional fact going to the power of the agency over the dispute,[159] such as whether an accident had occurred on navigable waters.

Although *Crowell* set the stage for modern administrative adjudication, much has happened since. The two limitations on which the Court relied to justify shifting article III business to agencies have eroded. Courts now defer to agency determinations of law as well as fact,[160] and the doctrines of constitutional and jurisdictional fact have fallen into disuse.[161] These developments reflect the evolving nature of administrative adjudications, which have developed attributes that promote competence and fairness.

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[152] *See* INS v. Chadha, 462 U.S. 919, 963-67 (1983) (Powell, J., concurring) (characterizing congressional review of agency adjudication as unconstitutional intervention in a judicial function).

[153] *See Bowsher*, 478 U.S. at 748-53 (Stevens, J., concurring) (noting the difficulty of drawing lines between the powers exercised by different branches, because particular functions "often take on the aspect of the office to which [they] are assigned").

[154] This subpart discusses the first two categories and Part VI addresses the third in connection with article II doctrine.

[155] 285 U.S. 22, 31 (1932).

[156] An examiner was to conduct evidentiary hearings on a record. *Id.* at 47-48.

[157] *Id.* at 46, 49.

[158] *See id.* at 49.

[159] *Id.* at 63-64.

Crowell evinced concern about the fairness of adjudication performed outside court. Modern administrative law responds partly through structure, partly through procedure. Ostensibly pursuing expertise, many agencies draw their membership from regulated groups. Typically, such agencies both investigate and adjudicate. This combination aids policy making but also gives rise to problems of bias and interest that the organizational separation of investigative and adjudicative staffs attempts to solve.[162] For similar reasons, administrative law judges enjoy statutory guarantees of their independence[163] and must normally follow APA procedures that attempt to balance informality and accuracy.

The Supreme Court has upheld this general arrangement against due process attack[164] because of the protections flowing from the separation of functions and procedural guarantees.[165] Moreover, the Court tolerates some loss of neutrality as the cost of obtaining the policy-making advantages of combined functions at the top of an agency.[166] Notwithstanding the Court's general approval, however, the characteristics of a particular scheme can present unacceptable dangers of bias or interest.[167]

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[160] *See* Chevron, U.S.A. v. Natural Resources Defense Council, 467 U.S. 837, 859-66 (1984); *see also* Starr, *Judicial Review in the Post-*Chevron *Era*, 3 YALE J. ON REG. 283, 292-99 (1986) (noting the Court's inconsistent application of this doctrine).

[161] *Crowell* held that reviewing courts should not only exercise independent judgment on these issues but also compile an independent record. Justice Brandeis dissented from the latter conclusion and has since been vindicated. *See* Monaghan, *supra* note 85, at 247-63.

[162] *See generally* Asimow, *When the Curtain Falls: Separation of Functions in the Federal Administrative Agencies*, 81 COLUM. L. REV. 759, 761-79 (1981) (reviewing statutory and constitutional law of separation of functions and surveying agency practice).

[163] *See* 5 U.S.C. §§ 3105, 5372, 7521 (1982); *see also* Lubbers, *Federal Administrative Law Judges: A Focus on Our Invisible Judiciary*, 33 ADMIN. L. REV. 109, 111-12 (1981) (describing APA provisions that attempt to ensure the independence of ALJs).

[164] *See, e.g.*, Withrow v. Larkin, 421 U.S. 35, 46-55 (1975) (finding that state board of medical examiners could both investigate and decide charges against a doctor).

[165] *See, e.g.*, Marshall v. Jerrico, Inc., 446 U.S. 238, 245-50 (1980) (finding that an administrator acting as prosecutor could make a preliminary assessment of civil penalties when the ALJ and not the administrator adjudicated the penalties).

[166] *See, e.g.*, Friedman v. Rogers, 440 U.S. 1, 18 (1979) (finding no constitutional objection to a legislature drawing administrators from an organization sympathetic to the rules to be enforced); Hortonville Joint School Dist. No. 1 v. Hortonville Educ. Ass'n, 426 U.S. 482, 492-96 (1976) (holding that a school board could both negotiate with teachers and discharge them for illegally striking after negotiations failed); FTC v. Cement Inst., 333 U.S. 683, 700-03 (1948) (holding that members of the Federal Trade Commission could both testify before Congress regarding the illegality of a practice and later adjudicate the matter).

[167] *See, e.g.*, Gibson v. Berryhill, 411 U.S. 564, 581 (1973) (refusing to allow a licensing board

Like the private delegation cases, therefore, administrative law displays a basic ambivalence about the deciders' neutrality—the benefits of obtaining knowledgeable or autonomous decision making inure at the risk of introducing unacceptable levels of bias or interest. Arbitration can ameliorate these problems. Its central premise is that consent to the process and practical guarantees of deciders' neutrality justify an informal and final procedure. Indeed, the nature of arbitration calls to mind an observation that Judge Friendly made in discussing administrative procedure: "[T]he further the tribunal is removed from . . . any suspicion of bias, the less may be the need for other procedural safeguards."[168]

B. Public Rights, Private Rights, and Federal Arbitration

The Court's decision in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*[169] cast into doubt matters long thought settled by *Crowell*. The statute at issue in *Northern Pipeline* authorized bankruptcy judges to decide all issues pertinent to the proceedings in their courts—including claims arising under state law—with review by article III judges.[170] A badly divided Court held that the allocation to bankruptcy judges of authority to decide state-law claims violated article III. The bankruptcy judges lacked article III status[171] but had powers closely resembling those of federal judges. A plurality of four justices[172] signed a formalist opinion that defined some matters as inherently judicial in the sense that federal courts must decide them in the first instance rather than supervise them in appellate review. Existing exceptions to mandatory article III jurisdiction failed to include bankruptcy matters.

The exception pertinent here concerned "public rights," which the plurality defined narrowly as claims against government that Congress could commit entirely to executive discretion, but not controversies between private persons arising incident to a federal program.[173] Thus, the

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drawn from one-half of a state's optometrists to decide whether the other half were engaged in unprofessional conduct); Ward v. Village of Monroeville, 409 U.S. 57, 60-61 (1972) (finding a due process violation because mayor trying petitioner was responsible for municipal finances and fines formed a substantial part of municipal revenues); Tumey v. Ohio, 273 U.S. 510, 523-31 (1927) (finding that a town mayor's personal pecuniary interest in convicting a defendant violated due process because the fines paid his salary). This line of cases has deep roots in the common law. *See* Plucknett, *Bonham's Case and Judicial Review*, 40 HARV. L. REV. 30, 34 (1926).

[168] Friendly, *"Some Kind of Hearing"*, 123 U. PA. L. REV. 1267, 1279 (1975).

[169] 458 U.S. 50 (1982).

[170] Review was to be by the "clearly erroneous" standard. *See id.* at 55 n.5.

[171] Instead of life tenure, the bankruptcy judges had 14-year terms, and they had no protections against salary diminution. *Id.* at 53.

[172] Justice Brennan wrote for the plurality, joined by Justices Marshall, Blackmun, and Stevens. *Id.* at 52.

[173] *See id.* at 67-69.

dichotomy between public and private rights rested partly on sovereign immunity. Congress, free to deny all relief for claims against the government, could take the lesser step of allocating the claims to an alternative forum. The plurality thus refused to define public rights as everything created pursuant to the substantive powers of Congress,[174] an interpretation that would have displaced some private rights of action.

The plurality thought that Congress could commit public rights cases to agencies, if it assured judicial review.[175] Nevertheless, the Justices emphasized that *Crowell* had endorsed nonjudicial decision only for issues of fact.[176] Yet the plurality conceded the erosion of the doctrines of constitutional and jurisdictional fact on which *Crowell* relied to preserve close supervision of agencies.[177] This analysis casts doubt on the permissibility of ordinary delegations of adjudicative power to agencies, because the plurality did not specify the relationship between agencies and courts that was necessary to pass constitutional scrutiny.

Two concurring justices took the more limited position that state-law claims removed from a state tribunal must go to an article III court.[178] The dissenters pointed out the inconsistency of the plurality's formulation with the ordinary pattern of administrative adjudication.[179] They thought that the bankruptcy scheme satisfied a functional inquiry, which entailed examining the strength of congressional interests in placing decision-making authority in another forum.[180] Moreover, they emphasized the statute's preservation of judicial review and found no danger of aggrandizement by the other branches at the expense of the courts as long as the subject matter was not especially significant to the political branches.[181]

The use of the public rights doctrine, which the Court has never explained coherently, sowed much confusion in *Northern Pipeline*.[182] The doctrine originated in a conclusory passage in *Murray's Lessee v. Hoboken Land & Improvement Co.*,[183] in which the Court upheld a summary procedure for the government to recoup funds from one of its cu toms collectors:

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[174] *See id.* at 80 n.32.

[175] *See id.* at 67-68 & 67 n.18.

[176] *See id.* at 78-82.

[177] *See id.* at 82 n.34.

[178] *See id.* at 91 (Rehnquist, J., concurring, joined by O'Connor, J.).

[179] *See id.* at 101-02 (White, J., dissenting, joined by Burger, C.J., and Powell, J.).

[180] *See id.* at 117.

[181] *See id.* at 116.

[182] *See, e.g.*, Redish, *Legislative Courts, Administrative Agencies, and the* Northern Pipeline *Decision*, 1983 DUKE L.J. 197, 204-14 (questioning the reasoning behind the public/private rights dichotomy). For an able historical treatment of the public rights doctrine, see Young, *Public Rights and the Federal Judicial Power: From* Murray's Lessee *Through* Crowell *to* Schor, 35 BUFFALO L. REV. 765 (1986).

[183] 59 U.S. (18 How.) 272, 284 (1856). *Murray's Lessee* appears to overturn an earlier case,

> [W]e do not consider congress can either withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty; nor, on the other hand, can it bring under the judicial power a matter which, from its nature, is not a subject for judicial determination. At the same time there are matters, involving public rights, which may be presented in such form that the judicial power is capable of acting on them, and which are susceptible of judicial determination, but which congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper.[184]

The Court, groping for appropriate limits to the jurisdiction of legi lative and administrative courts, has used the public rights doctrine t label outcomes. For example, in *Atlas Roofing Co. v. Occupational Safet & Health Review Commission*,[185] the Court considered whether the sev enth amendment applies to the assessment of civil penalties in an admin istrative adjudication. The Court held that when the government "sue in its sovereign capacity to enforce public rights created by statute within the power of Congress to enact," the seventh amendment doe "not prohibit Congress from assigning the fact-finding function and ini tial adjudication to an administrative forum with which the jury woul be incompatible."[186]

Although it replaced analysis with assertion, the Court did suggest functional basis for its holding. The seventh amendment does not re quire Congress to "choke the already crowded federal courts with nev types of litigation," nor does it prevent it from "committing some new types of litigation to administrative agencies with special competence ir the relevant field."[187] The Court observed that this conclusion woul follow even if the seventh amendment would require a jury had Congres assigned the adjudication of "those rights . . . to a federal court of law

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United States v. Ames, 24 F. Cas. 784, 789-90 (C.C.D. Mass. 1845) (No. 14,441), in which a cour refused to enforce an arbitration award involving the water rights of the United States and anothe riparian owner. As an alternate ground of decision, the court stated a principle forbidding the delegation of article III judicial power outside the courts. *Id.* at 789.

[184] *Murray's Lessee*, 59 U.S. (18 How.) at 284. The Court's difficulty in articulating its distinction comprehensibly probably stemmed from its recognition of the overlap of judicial and executive functions, which it drew from Chief Justice Marshall's insight in *Ex parte Randolph* (quoted at *supra* note 148). The *Murray's Lessee* Court acknowledged "[t]hat the auditing of the accounts of a receiver of public moneys may be, in an enlarged sense, a judicial act . . . . So are all those administrative duties the performance of which involves an inquiry into the existence of facts and the application to them of rules of law." *Murray's Lessee*, 59 U.S. (18 How.) at 280.

[185] 430 U.S. 442 (1977).

[186] *Id.* at 450.

[187] *Id.* at 455.

instead of an administrative agency."[188] The result of *Atlas Roofing*, then, appears to be that Congress may choose the forum for adjudicating "public rights," and the forum choice dictates procedural requisites.[189]

The Court's recognition of congressional interests in reducing judicial case loads and obtaining executive policy-making skills supports administrative adjudication directly, and arbitration indirectly. Case loads burden administrators as well as judges, and the executive's "special competence" extends to choice of administrative process as well as choice of policy. The choice of either administrative adjudication or arbitration often reflects the advantages of providing a fact finder far more expert in technical subject matter than the lay members of a jury.

The *Northern Pipeline* plurality did not persuasively explain why Congress may shift federal questions out of the courts more readily than diversity cases.[190] The Court's reliance on sovereign immunity, itself a nineteenth century judicial construct,[191] is patently unrealistic. Congress is not likely to dismantle the administrative state and restore federal jurisdiction to its 1850 contours, so that complainants would bring federal questions in state court and present claims against the government to Congress.[192] Moreover, the plurality's "the greater includes the lesser" argument is vulnerable to theoretical rejoinders. Congress, having the power to withhold federal jurisdiction in diversity cases, could allocate those cases to bodies other than federal courts. A similar argument applies to arbitration: Congress, having authority under the FAA to place adjudication entirely in private hands, may authorize arbitration within executive branch programs.

Indeed, the plurality's formulation appears to be exactly backwards—article III's protections for federal judges aim principally to ward off assaults from the other two branches, not to assure correct decisions of state law.[193] If the Court is struggling to identify core judicial functions that Congress cannot assign elsewhere, diversity cases seem an odd place to begin. Of course, the plurality's doctrine had to accommodate some existing administrative adjudication of public rights. Correctly viewed, however, the problem is not one of labeling but rather one of limits.

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[188] *Id.*

[189] In Tull v. United States, 481 U.S. 412 (1987), the Court considered the applicability of the seventh amendment to civil penalty actions brought in federal district court under the Clean Water Act, 33 U.S.C. § 1319 (1982). The Court unanimously held that the right to a jury attaches to a federal court determination of liability for penalties. In a footnote, the Court distinguished *Atlas Roofing* as "holding that the Seventh Amendment is not applicable to administrative proceedings." *Tull*, 481 U.S. at 418 n.4.

[190] *See* Redish, *supra* note 182, at 208-11.

[191] *See generally* P. SHANE & H. BRUFF, THE LAW OF PRESIDENTIAL POWER 43 (1988) (discussing the origins of the sovereign immunity doctrine).

[192] For a description of the shift to judicial resolution of claims against the United States, see Glidden Co. v. Zdanok, 370 U.S. 530, 552-58 (1962).

[193] For an argument that article III's tenure protections are also important in diversity cases, see Geras v. Lafayette Display Fixtures, 742 F.2d 1037, 1051-52 (7th Cir. 1984) (Posner, J., dissenting).

The Court has recognized several justifications for placing adjudicative functions in the executive. One is the use of adjudication to form policy.[194] The Court's doctrine of deference to an agency's judgments of law and policy extends to the adjudicative context.[195] This deference often permits agencies substantial latitude, because the policy-making component of agency adjudication varies across a wide spectrum. Compare the broad policy orientation of the Federal Communications Commission's hearings on renewal of broadcast licenses,[196] for example, with the narrow factual focus of a Social Security Administration determination of an individual's disability.[197]

The justification for transferring adjudication out of federal court does not evaporate when an agency, like an arbitrator, focuses on application of an established legal criterion to disputed facts.[198] A traditional justification for creating agencies has been to obtain speedy and informal adjudication by a fact finder with expertise in the subject matter. Courts give weight to congressional judgments about the appropriateness of administrative rather than judicial processes.[199] By shunting fact-intensive adjudications to agencies or arbitrators, Congress frees the federal courts to carry out their central responsibilities of interpreting the Constitution and statutes.

Northern Pipeline demonstrates that formalism's broad sweep is inappropriate for allocations of adjudicative power among the branches.[200] The justification for formalism in preventing aggrandizement is likely to be absent.[201] Functional analysis focuses the Court's attention on the policies underlying article III and permits the diverse procedural arrangements that the structure of our government demands. Fortunately, later cases have employed functionalism to curtail the implications of *Northern Pipeline*.

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[194] *See, e.g.*, SEC v. Chenery Corp., 318 U.S. 80, 89-90 (1943).

[195] *See, e.g.*, NLRB v. Hearst Publications, 322 U.S. 111, 130-32 (1944) (finding that lower courts should uphold a NLRB determination of how a broad statutory term should apply if the determination is supported by the record and has a reasonable basis in law).

[196] *See generally* Robinson, *The Federal Communications Commission: An Essay on Regulatory Watchdogs*, 64 VA. L. REV. 169 (1978).

[197] *See generally* J. MASHAW, *supra* note 35, at 23-24, 126-27.

[198] For a helpful summary of administrative law distinctions between issues of fact and law, see NLRB v. Marcus Trucking Co., 286 F.2d 583, 590-91 (2d Cir. 1961) (Friendly, J.).

[199] *See, e.g.*, Walters v. National Ass'n of Radiation Survivors, 473 U.S. 305, 319-26 (1985) (observing that courts should give legislatures substantial discretion in formulating procedural processes).

[200] *See* Strauss, *supra* note 4, at 629-33.

[201] The other justification for formalism, drawing clear lines of political accountability, *see* Bruff, *supra* note 133, at 502-09, suggests allocating adjudicative functions with a strong policy-making component to the executive, to allow accountability to operate.

In *Thomas v. Union Carbide Agricultural Products Co.*,[202] the Court upheld the mandatory arbitration requirements of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA).[203] Under the Act, manufacturers wishing to register and market a pesticide must give the Environmental Protection Agency (EPA) their research data on the product's effects. The EPA considers the data for both the initial registration and later filings for similar products submitted by other manufacturers. Later registrants must compensate the earlier ones for use of the data, in amounts determined by arbitration if the manufacturers cannot agree.[204] A federal court can set aside an arbitrator's award only for "fraud, misrepresentation, or other misconduct."[205]

Writing for the majority in *Thomas*, Justice O'Connor rejected "doctrinaire reliance on formal categories"[206] as a guide to article III and instead favored an analysis focusing on the right at issue and the congressional purposes behind the scheme. The majority characterized FIFRA as creating a compensatory right with many public characteristics.[207] It concluded that Congress could authorize an agency to "allocate costs and benefits among voluntary participants" in a regulatory program without providing an article III adjudication.[208]

Justice O'Connor interpreted *Northern Pipeline* as holding only that Congress could not give a non-article III court power to decide state-law contract actions without the litigant's consent and subject only to ordinary appellate review.[209] She rejected an argument that FIFRA had created a "private right," explicitly disapproving the definition advanced by the *Northern Pipeline* plurality insofar as it turned on whether "a dispute is between the Government and an individual."[210] Justices Brennan, Marshall, and Blackmun concurred, abandoning any implication that public rights cases are restricted to those in which the government is a party and explaining that their *Northern Pipeline* position focused on the state law nature of the claims at issue.[211]

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[202] 473 U.S. 568, 594 (1985).

[203] 7 U.S.C. § 136a(c)(1)(D)(ii) (1982). *See generally* Note, *FIFRA Data-Cost Arbitration and the Judicial Power:* Thomas v. Union Carbide Agricultural Products Co., 13 ECOLOGY L.Q. 609, 619-23 (1986) (discussing the Court's failure to provide a clear test for determining the extent to which nonjudicial forums may be used to resolve such federal disputes).

[204] The agency uses the AAA's roster of commercial arbitrators and its usual methods for mutual selection by the parties, although there are certain special AAA procedures for conducting FIFRA arbitrations. *See* 29 C.F.R. § 1440 app. (1988).

[205] 7 U.S.C. § 136a(c)(1)(D)(ii) (1982). The EPA can enforce compliance with the award through sanctions, including denial of compensation or cancellation of a party's registration, as the case may be. *See id.*

[206] *Thomas*, 473 U.S. at 587.

[207] *See id.* at 589. During the previous term, the Court held the EPA's consideration of the data to be a "public use," although the "most direct beneficiaries" of that use were the later applicants. Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1005 (1984) (holding that in certain circumstances this public use effected a compensable taking).

[208] *Thomas*, 473 U.S. at 589.

[209] *See id.* at 584.

In passing, the Court squelched the *Northern Pipeline* plurality's threat to the structure of the administrative state. The Court stated that *Crowell* fell within mandatory article III jurisdiction because it concerned a statute that replaced a common-law action.[212] The Court also recognized that judicial review of administrative adjudication is often limited or unavailable.[213] The *Thomas* majority thus made clear that the continued vitality of *Crowell* does not rest on outmoded doctrines requiring stringent judicial review.

Turning to the use of arbitration, the Court noted Congress's need to streamline compensation controversies.[214] It perceived a close nexus between the use of arbitration and effective administration of the pesticide registration program. The Court also emphasized the existence of consent by the affected firms; it considered the danger of encroachment on the judiciary's central role to be "at a minimum when no unwilling defendant is subjected to judicial enforcement power."[215]

The Court accepted the statute's limitations on judicial review, which it read to allow reversal of arbitrators "who abuse or exceed their powers or willfully misconstrue their mandate under the governing law."[216] The concurring Justices, like the majority, echoed the traditional "manifest disregard for the governing law" standard of review.[217] The Court also held that review for constitutional error was available, alleviating any due process concerns about the extent of review.[218]

Thomas demonstrates the absence of clear distinctions between public and private rights in federal programs. Congress had a substantial "public" purpose in choosing arbitration in FIFRA—to relieve the executive of tangled administrative adjudications. Congress, however, could have shifted the compensation controversies into federal court without offending article III. Aware of that alternative and its consequence for judicial case loads, the Court embraced arbitration and accorded the courts a minimal supervisory role.

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[210] *Id.* at 586.

[211] *See id.* at 595-97 (Brennan, J., concurring). Justice Stevens, also concurring, thought the challengers lacked standing. *Id.* at 605 (Stevens, J., concurring).

[212] *Id.* at 587 (O'Connor, J.).

[213] *See id.* at 583.

[214] Arbitration replaced an earlier procedure by which the EPA adjudicated compensation, subject to judicial review. This scheme proved cumbersome and unworkable; in 1978 Congress turned to arbitration. *Id.* at 571-75.

[215] *Id.* at 591.

[216] *Id.* at 592.

[217] *Id.* at 601 (Brennan, J., concurring, joined by Blackmun and Marshall, JJ.); *see* Fletcher, *supra* note 50, at 456.

[218] The parties had abandoned due process objections to the nature of statutory review of the arbitrations, so the Court did not formally address that issue. *See Thomas*, 473 U.S. at 592-93.

Although some of the language in Justice O'Connor's opinion in *Thomas* suggests that article III courts must hear common-law claims, the Court has since modified its stance. In *Commodity Futures Trading Commission v. Schor*,[219] the Court upheld the authority of the Commodity Futures Trading Commission (CFTC) to entertain state-law counterclaims in reparation proceedings when disgruntled customers seek redress for brokers' violations of statutes or regulations. The Commodity Exchange Act authorized CFTC adjudicators to decide counterclaims arising out of transactions properly alleged in a complaint.[220] Schor filed a claim for reparations, and the defendants counterclaimed for debt.

Justice O'Connor's opinion for seven Justices relied in part on consent—Schor chose the CFTC's "prompt" and "inexpensive" procedure instead of a lawsuit.[221] Indeed, the Court compared this option to arbitration and concluded that the voluntary choice of informal procedures minimized separation of powers concerns.[222] The Court then asked whether the new forum exercised the "range of jurisdiction and powers normally vested only in Article III courts"[223] and whether the latter retained the " 'essential attributes of judicial power.' "[224] Only the jurisdiction over counterclaims differed from the usual agency model.[225] The Court saw no reason to deny agencies all pendent jurisdiction and found federalism concerns minimal, because federal courts could have entertained the claims.[226] Thus, *Schor* suggests that agencies may resolve any state-law claim closely related to a federal issue within their jurisdiction. Agencies' exercise of pendent jurisdiction reduces federal court case

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219. 478 U.S. 833, 841 (1986).

220. *See* 7 U.S.C. § 12a(5) (1982); *see* 17 C.F.R. § 12.19 (1988).

221. *Schor*, 478 U.S. at 850.

222. *Id.* at 850-51.

223. *Id.* at 851.

224. *Id.* at 852 (quoting Crowell v. Benson, 285 U.S. 22, 51 (1932)). Justices Brennan and Marshall, dissenting, argued that the majority was allowing the undue dilution of judicial authority in service of legislative convenience. *Id.* at 861-62 (Brennan, J., dissenting).

225. The CFTC's jurisdiction was specialized, its enforcement powers limited, and its orders enforceable only by order of the district court. *Id.* at 852-53 (O'Connor, J.).

226. *See id.* at 857-58.

loads by resolving potential diversity cases; arbitration accompanied by minimal judicial supervision maximizes this benefit.

In both *Thomas* and *Schor*, as in the FAA cases, the Court emphasized the consent of the participants as a justification for nonjudicial processes. *Schor* was an easy case, because the plaintiff could choose between a lawsuit and agency adjudication. *Thomas*, however, was another matter. The Court strained to characterize FIFRA registrations as "voluntary"—the choice available to a chemical company is to forgo marketing a pesticide it does not register. In the labor relations cases, the Court inquired more carefully into consent to arbitration,[227] especially when the process affected important individual liberties. Indeed, at times participants could not waive judicial process.[228] *Thomas*, then, perhaps heralded a looser standard of consent for federal regulatory programs, allowing public values to offset concern for the autonomy of the regulated party.[229] The subject matter of a dispute certainly should affect the stringency of judicial scrutiny of consent to arbitration. Nevertheless, courts should not simply avoid an article III inquiry by employing a fiction that the parties consented.

The schemes in both *Thomas* and *Schor* promoted the original purpose of article III's protections: to guarantee the independence of adjudication from political pressure emanating from the executive or Congress. In *Thomas*, the Court remarked that shifting from agency adjudicators to private arbitrators "surely does not diminish the likelihood of impartial decision-making, free from political influence."[230] Similarly, in *Schor* it noted that Congress had placed adjudication in an independent agency, which would be "relatively immune from the 'political winds that sweep Washington.' "[231] Arbitration is superior to agency adjudication in this regard, because it increases the decider's independence.

Today it seems unlikely that Congress will run afoul of *Northern Pipeline* unless the subject matter involves prized judicial responsibilities. Also, jeopardy arises when the powers of a new tribunal (and, perhaps, the tenure of the deciders) closely approximate those of courts. In such

[227] *See supra* notes 79-81 and accompanying text.

[228] *See supra* note 80.

[229] In *Thomas*, the Court also noted that affected companies had given some prior consent by participating in the political compromise that led to the arbitral scheme. Thomas v. Union Carbide Agric. Prods. Co., 473 U.S. 568, 575 (1985). A more extreme case than *Thomas* in imputing consent to arbitration is Geldermann v. Commodity Futures Trading Comm'n, 836 F.2d 310, 323 (7th Cir. 1987), which upheld a CFTC regulation requiring brokerage firms to submit customer complaints to arbitration as a condition of doing business.

[230] *Thomas*, 473 U.S. at 590.

[231] Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 836 (1986) (quoting H.R. Rep. No. 975, 93d Cong., 2d Sess., pt. 1, at 44 (1974)).

situations, judges are likely to find interference with their core functions. On the other hand, when expeditious process clearly serves non-article III functions—such as ordinary program administration—the courts are not likely to insist that Congress increase their already heavy case loads. Therefore, arbitration should be safe from a successful article III assault as long as Congress confines it to specialized subject matter in federal programs with related executive functions.

C. Limiting Judicial Review

Judicial review of arbitration has always been more limited than review of administrative adjudication. Nevertheless, a minimum level of oversight of awards should be preserved. *Thomas* suggests that courts will review at least the facial consistency of an arbitral award with statutory criteria and constitutional norms.[232] These inquiries require only a brief statement of the basis for an award.[233] They also accord with the FAA's general criteria for review of arbitration and would not require probing the factual basis of awards. More intensive review would destroy the informality that accounts for the virtues of arbitration.

In general, courts seem most likely to reach issues that concern the overall structure and validity of a statutory scheme rather than its application to particular facts.[234] Thus, courts routinely permit constitutional inquiry of statutes that appear to preclude all review.[235] Judges thereby avoid reaching troubling issues about the power of Congress to insulate administrative action completely.

The Supreme Court recently considered whether arbitration of Medicare claims denies procedural due process.[236] In a companion case, *United States v. Erika, Inc.*,[237] the Court found that Congress did not authorize judicial review of particular awards. The preclusion, however, covered only the processing of individual claims and not initial determinations of entitlement to participate in the Medicare program.[238] Similarly, the Court subsequently held that the preclusion did not encompass statutory issues concerning the overall method for the computation of claims, as opposed to particular determinations under the general criteria.[239] So limited, the review scheme prevents " 'the overloading of the courts with trivial matters.' "[240]

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[232] *See Thomas*, 473 U.S. at 592-93.

[233] The ACUS recommends such a statement. *See* Agencies' Use of Alternative Means of Dispute Resolution (Recommendation No. 86-3), 1 C.F.R. § 305.86-3 (1988).

[234] *See* Fallon, *supra* note 143, at 975-82.

[235] *See, e.g.*, Johnson v. Robison, 415 U.S. 361, 367 (1974) (holding limitation on judicial review in Veterans Benefit Act does not apply to questions arising under the Constitution); Bartlett v. Bowen, 816 F.2d 695, 702 (D.C. Cir. 1987) (holding limitation on judicial review in Medicare Act does not apply to constitutional challenges).

[236] *See* Schweiker v. McClure, 456 U.S. 188, 195 (1982); *see infra* subpart VI(A).

[237] 456 U.S. 201, 206 (1982).

[238] *Id.* at 207. The Court did not reach issues concerning any constitutional right to review. *See id.* at 211 n.14.

By deferring to agency review of arbitrator's decisions, courts can further reduce the burden on their dockets. Because arbitration is inappropriate for elaborating public-law norms, most arbitrations should be free of substantial constitutional or statutory issues. Agencies can handle "retail" review for misconduct and for inconsistency with statutory standards and thereby reduce judicial case loads; the important goal is to check the arbitrators' actions.[241] If courts typically defer to interpretations of statutes by administering agencies, there seems equal reason to defer to an agency that reviews an arbitrator.[242]

Forgoing judicial review of some aspects of arbitration in federal programs is consistent with the tradition that courts do not review all law-applying decisions that occur within the executive branch.[243] The aspects of arbitration that would escape judicial review would resemble some kinds of executive functions that courts presently decline to review. Like arbitration programs, these functions feature needs for expertise, informality, and expedition; a large volume of potentially appealable actions; and the presence of methods other than judicial review for preventing abuses of discretion.[244]

VI. Due Process

The allocation of adjudicative functions under federal programs raises due process concerns about the adequacy of procedural protections for affected persons. This Part addresses those concerns. It first looks at the Court's due process analysis of one aspect of the Medicare program. It then draws on those principles to suggest a general approach to protecting due process rights in arbitral schemes.

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[239] *See* Bowen v. Michigan Academy of Family Physicians, 476 U.S. 667, 675 (1986). Congress later precluded this form of judicial review in the Omnibus Budget Reconciliation Act of 1986, Pub. L. No. 99-509, § 9341(a)(4), 100 Stat. 1874, 2038 (codified at 42 U.S.C. § 1395ff(b)(4) (Supp. IV 1986)).

[240] *Erika*, 456 U.S. at 210 n.13 (quoting 118 CONG. REC. 33992 (1972) (statement of Sen. Bennett)).

[241] Thus, Congress might also shift determinations of the arbitrability of particular issues from the courts to the agencies when the government is not a party.

[242] *See* International Bhd. of Elec. Workers v. ICC, 862 F.2d 330, 336 (D.C. Cir. 1988) (upholding ICC's authority to review arbitral awards for "recurring or otherwise significant issues of general importance").

[243] *See* Heckler v. Chaney, 470 U.S. 821, 828-32 (1985); Young, *supra* note 182, at 795-801.

[244] *See* Saferstein, *Nonreviewability: A Functional Analysis of "Committed to Agency Discretion"*, 82 HARV. L. REV. 367, 377-95 (1968).

A. Schweiker v. McClure *and General Due Process*

In *Schweiker v. McClure*,[245] a unanimous Court upheld the authority of private insurance carriers to resolve disputed Medicare claims without a right of appeal. The program at issue in *McClure* is financed by federal appropriations and premiums from participants and is a voluntary supplement to basic Medicare that covers most of the cost of certain medical services. As the Court noted, the program resembles subsidized private insurance on a massive scale: in one year there were 27 million participants, 10 billion dollars paid in benefits, and 158 million claims.[246]

Congress authorizes the Department of Health and Human Services (HHS) to contract with private insurers, such as Blue Cross, to administer these claims payments.[247] HHS pays administrative costs and specifies the claims process. Upon receiving a claim, the carrier makes an initial determination of the reasonableness of the charge for covered services. If the claim is denied, the claimant is allowed a de novo redetermination on a written appeal to a new decider. If the claim is for more than one hundred dollars, a claimant who is still dissatisfied may receive an oral hearing in front of a carrier employee who was not involved in the prior decisions and who writes a decision based on the record.[248] At the time *McClure* was decided, the claimant received no further appeal.[249]

The Court began by rejecting a due process charge of bias on the part of the deciders. It found that the carriers and their employees had no financial interest in denying claims.[250] The Court then turned to the argument that due process requires additional administrative or judicial review by a government officer. Applying the familiar criteria of *Mathews v. Eldridge*,[251] the Court assumed that the weight of the private interest was "considerable."[252] The weight of the government's interest in efficiency was unclear, but the Court assumed that providing review by an administrative law judge would not be "unduly burdensome."[253] Focusing on the risk of erroneous decision and the value of additional process, the Court stressed the HHS requirements that deciders be both qualified to conduct hearings on medical matters and thoroughly familiar with the program and its governing law and policy.[254] Because of these requirements, the Court perceived no constitutional deficiencies in the adjudicative procedures nor any need that the deciders be attorneys.[255]

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[245] 456 U.S. 188, 195 (1982).

[246] *See id.* at 190.

[247] *See* 42 U.S.C. § 1395u(a) (1982).

[248] *See id.* § 1395u(b).

[249] Congress has since amended this statute to grant beneficiaries with claims over $500 a hearing before an administrative law judge; those with claims over $1000 also receive judicial review. Claims between $100 and $500 are decided as before. Omnibus Budget Reconciliation Act of 1986, Pub. L. No. 99-509, § 9341(a)(1)(C), 100 Stat. 1874, 2038 (codified at 42 U.S.C. § 1395ff(b)(2) (Supp. IV 1986)).

[250] *McClure*, 456 U.S. at 196-97.

[251] 424 U.S. 319, 335 (1976).

> [I]dentification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id.

B. Analysis of the Particular Attributes of Arbitral Schemes

Voluntary arbitration should usually satisfy due process criteria. In general, a party's consent to a particular procedure is the best guarantee of fairness, if the alternatives are also acceptable. (Here, the alternative would be ordinary administrative process.) Of course, there are limits to what a citizen may bargain away for the benefits of an expeditious decision.[256] To steer clear of those limits, Congress should avoid authorizing arbitration for disputes in which constitutional or statutory rights are evolving and need the special contributions of both administrators and judges.

Some arbitration schemes involve consent of a different kind. As in *McClure*, participation in a federal program may be voluntary, even though there is no assent to arbitral techniques. Courts should not relax their inquiry into procedural fairness in these situations. The doctrine of unconstitutional conditions, checkered as its history may be, sets limits on the government's power to bargain for citizens' rights with program benefits.[257] Thus, in *McClure* it was significant that the underlying entitlement to participate in Medicare was not subject to arbitration, unlike the amount of particular claims. *McClure* thereby accords with the *Eldridge* formulation, under which the acceptability of arbitration depends to a large extent on an individual's interest in a program's benefits.

An important consideration from the functional portion of the *Eldridge* calculus is whether the arbitral scheme assures the neutrality and competence of the decider. Recall Judge Friendly's point that assurances of neutrality reduce the need for other procedural safeguards.[258] *McClure* shows that the Court does not regard agency deciders as necessarily fairer or more reliable than private ones.[259]

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[252] *McClure*, 456 U.S. at 198.

[253] *Id.* The district court decision had called for a de novo hearing before an administrative law judge. *Id.* at 195. The Court did not separately consider whether due process might require more limited administrative review, such as review of the decider's written decision.

[254] *See id.* at 198-200.

[255] *See id.* at 199 n.4.

[256] *See supra* notes 79-81 and accompanying text.

[257] *See generally* Kreimer, *Allocational Sanctions: The Problem of Negative Rights in a Positive State*, 132 U. PA. L. REV. 1293, 1327-33 (1984) (discussing the historical origins and development of the unconstitutional conditions doctrine).

In *McClure*, as in *Eldridge*, some guarantees of neutrality stem from the functions assigned to the decider. These nonadversarial hearings do not include government representation, and the decider must assist the private applicant in developing the case.[260] In such an atmosphere, any incentive to favor one side probably benefits the claimant. The *McClure* Court mentioned the government's interest in avoiding overpayment of claims only in passing—in the context of rejecting a bias claim based on HHS attempts to encourage carriers to detect overpayments.[261] This suggests that agencies should avoid instructions to arbitrators that seem to promote bias for either side.

The Court seems prepared to accept practical considerations of background and training, without regard to formal affiliation or status, as guarantees of decider competency.[262] The Court has also indicated that the need for lawyers in federal programs turns on the extent to which formal rules of evidence apply and on the need for other kinds of expertise in the decider. For example, the Court effectively excluded lawyers from Veterans Administration claims proceedings by upholding a ten-dollar fee limit: "Simple factual questions are capable of resolution in a nonadversarial context, and it is less than crystal clear why *lawyers* must be available to identify possible errors in *medical* judgment."[263]

Under any particular program, the appropriateness of arbitral process depends on the nature of the participants and the issues. In *Gray Panthers v. Schweiker*,[264] for example, the court held that the Medicare procedure for claims under one hundred dollars failed to satisfy due process in two respects. First, notice of procedural options needed to be adapted to the capacities of elderly and infirm claimants.[265] Second, oral hearings were necessary for claims raising issues of credibility.[266] It sufficed, however, to shape the process to accommodate " 'the generality of cases, not the rare exceptions.' "[267]

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[258] *See supra* text accompanying note 168.

[259] *See McClure*, 456 U.S. at 197 & n.11.

[260] *Id.* at 197 n.11.

[261] *See id.* at 196 n.9.

[262] *See id.* 198-200 (upholding selection criteria for deciders because they included a requirement of "thorough knowledge" of the Medicare program, although they did not require a decider to hold a law degree).

[263] Walters v. National Ass'n of Radiation Survivors, 473 U.S. 305, 330 (1985).

[264] 652 F.2d 146, 172 (D.C. Cir. 1980).

[265] *Id.*

[266] *Id.*

The fairness of arbitration derives partly from the specificity of th governing standard. A standard should be specific enough to meet th primary needs of the parties, the arbitrator, and the reviewing entitie The parties need enough information to exercise meaningful consent t the use of arbitration and to present their cases. The arbitrators nee enough guidance to make awards that will be consistent with each othe The reviewing entities must be able to judge the facial validity of award In *Thomas*, arbitrators were to provide "compensation" to pesticide registrants for the use of their data.[268] The vagueness of this standard raise fundamental questions: for example, does it mean the cost of creatin the data or the value to the later registrant?[269] An agency presented wit such a vague statutory directive should elaborate it through rulemakin before asking arbitrators to apply it.[270]

Provisions for review by an agency or a court under the standards o the FAA also help to ensure the accuracy of arbitrations. Review focuses on the two most important ways in which arbitration can g awry—loss of neutrality in the decider and an award exceeding the bounds of the *ex ante* expectations of the parties. It would be difficult t provide added checks without radically formalizing the process.

The strength of the government's interest in informality varies. It is relatively great in high volume, small dollar contexts, such as Medicare, in which fact questions predominate. When expeditious processes are available, it is possible to devote more resources to the formal processes needed for resolution of policy or formation of precedent. Insofar as the government's fiscal interest concerns payment of awards as well as provision of process, however, the government's advantage is not a simple matter of minimizing procedural costs. Instead, the government should seek a process that optimally balances accuracy and cost. Such a balance is a peculiarly executive function, and as *Eldridge* emphasizes, the agency's choice of process is entitled to deference by a court weighing the dictates of due process.[271]

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[267] Gray Panthers v. Schweiker, 716 F.2d 23, 36 (D.C. Cir. 1983) (quoting Mathews v. Eldridge, 424 U.S. 319, 344 (1976)).

[268] The Court did not reach a delegation doctrine challenge to the adequacy of this standard. *See* Thomas v. Union Carbide Agric. Prods. Co., 473 U.S. 568, 593 (1985).

[269] *See* PPG Indus. v. Stauffer Chem. Co., 637 F. Supp. 85, 87 (D.D.C. 1986) (upholding the standard and stating that the arbitrator has discretion to choose the compensation formula).

[270] This elaboration would provide at least a partial response to the argument by Fallon, *supra* note 143, at 991, that *Thomas* was wrongly decided because decisions "of federal law" were committed to arbitrators, with very limited judicial review.

[271] *See* Mathews v. Eldridge, 424 U.S. 319, 349 (1976).

VII. Executive Branch Supervision

Execution of the laws typically entails a complex mix of law-interpreting, policy making, and fact-finding.[272] Much execution occurs through adjudication, performed by a variety of processes. The acceptability of arbitration depends in large part on the extent to which Congress or the executive may transfer these decisions to private arbitrators, consistent with the Constitution's vesting of "[t]he executive Power" in the President and his subordinates.[273] Executive preference for a delegation may mute a constitutional inquiry, but it will not foreclose one, because article II joins responsibility with power in its command to "take Care that the Laws be faithfully executed."[274]

A. Adjudicative Activities and Executive Responsibility

The President's constitutional powers "are not fixed but fluctuate,"[275] depending on the context in which they are considered. The extent of presidential authority to supervise administration depends on several variables: subject matter, government structure, and procedure.[276] These variables affect relationships between the executive and private deciders, interacting to yield a judgment about appropriate kinds of supervision for particular functions. Arbitration should satisfy article II concerns if the structure and procedure used allow executive supervision appropriate to the particular context.

1. Subject Matter.—The first variable is subject matter, as it relates to the text and structure of the Constitution. A President's strongest powers derive directly from the Constitution, as in foreign affairs, whereas the powers are at their weakest when actions affect individual liberties that enjoy their own constitutional protection. Our "political Constitution" plays a role here. Decisions that have a relatively high policy content implicate the President's unique national political constituency[277] and maximize the need for supervision.[278] By contrast, the application of policy to particular individuals introduces a competing constitutional value—due process.[279]

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[272] *See* Bowsher v. Synar, 478 U.S. 714, 732-33 (1986).

[273] U.S. CONST. art. II, § 1, cl. 1.

[274] *Id.* § 3.

[275] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

[276] *See generally* Bruff, *Presidential Power and Administrative Rulemaking*, 88 YALE L.J. 451, 488-508 (1979) (employing a functional analysis to evaluate the authority for presidential initiatives).

[277] *See* Cutler & Johnson, *Regulation and the Political Process*, 84 YALE L.J. 1395, 1411 (1975) (explaining that the President's unique ability to intervene in critical situations derives from being the only nationally elected officer).

[278] *See* Sierra Club v. Costle, 657 F.2d 298, 405 (D.C. Cir. 1981) (recognizing "the basic need of the President and his White House staff to monitor the consistency of executive agency regulations with Administration policy").

Administrators frequently make policy through adjudication;[280] the President, therefore, has a substantial claim to overall supervision, not including intervention in a particular pending case.[281] Of course, the policy-making content of adjudication varies substantially.[282] For example, in *McClure* no one thought to raise article II objections to the arbitration of Medicare claims, presumably because of their fact intensiveness.

2. *Structure.*—Congress imposes limits on executive oversight, but the ultimate reach of this congressional power has always been uncertain.[283] To minimize executive oversight, Congress allocates adjudicative functions to federal courts, legislative courts, or independent agencies.[284] Courts have honored these attempts to insulate adjudication from presidential influence. The cases establishing the special constitutional status of independent agencies emphasize the due process concerns of agency decision makers.[285] The current debate over the constitutional status of these agencies centers on presidential authority to supervise their policy-making functions.[286] Meanwhile, the Supreme Court continues to treat the independent agencies as a viable part of government.[287]

[279] Due process imposes little constraint on general policy making. *See* Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, 435 U.S. 519, 542 & n.16 (1978) (stating that the Constitution does not require additional procedural devices in rulemaking proceedings).

[280] *See* NLRB v. Bell Aerospace Co., 416 U.S. 267, 292-93 (1974) (recognizing that administrators must exercise powers on a case-by-case basis to resolve specialized problems); SEC v. Chenery Corp., 332 U.S. 194, 202-03 (1947) (allowing administrators to announce new principles in resolving issues not expressly covered by an existing administrative rule).

[281] *See* ROADS TO REFORM, *supra* note 2, at 79, 82.

[282] *See supra* notes 196-97 and accompanying text.

[283] *See generally* M. OGUL, CONGRESS OVERSEES THE BUREAUCRACY: STUDIES IN LEGISLATIVE SUPERVISION 16-18 (1976) (noting the fluctuations in Congress's exercise of power over agencies in the 1960s and 1970s); G. ROBINSON, E. GELLHORN & H. BRUFF, THE ADMINISTRATIVE PROCESS 117-31 (3d ed. 1986) (discussing executive supervision of policy making by administrative agencies).

[284] Of course, executive power over these entities varies, but the President retains his appointment power for all of them.

[285] *See* Wiener v. United States, 357 U.S. 349, 356 (1958) (holding that the President cannot remove a member of the War Claims Commission without cause); Humphrey's Ex'r v. United States, 295 U.S. 602, 623 (1935) (holding that the President cannot remove a member of the Federal Trade Commission without cause).

[286] *See* Diver, *Presidential Powers*, 36 AM. U.L. REV. 519, 519-21 (1987) (discussing the uncertain place of agencies in the constitutional order); Miller, *Independent Agencies*, 1986 SUP. CT. REV. 41, 45 (discussing the implications of growing presidential power over administrative agencies).

[287] *See, e.g.*, Morrison v. Olson, 108 S. Ct. 2597, 2609-11 (1988) (holding that Congress may restrict President's power to remove officers, absent conflict with President's performance of his constitutional duties); Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 836 (1986) (praising independence of CFTC as a bulwark to fairness of adjudication); Bowsher v. Synar, 478 U.S. 714, 733 (1986) (discussing the independence of agencies and the inability of Congress to remove members except for impeachable offenses).

3. *Procedure.*—Congress also affects presidential power by specifying agency procedure. Formal adjudication enjoys constitutional[288] and statutory[289] protections from outside interference by anyone, including the President. Rulemaking, on the other hand, is subject to increasingly ambitious executive management.[290] Informal adjudication occupies a gray area in which Congress often fails to specify procedures, leaving the courts to define the permissibility of outside contacts.[291]

4. *Applying the Constitutional Criteria.*—The Supreme Court has emphasized since *Crowell* that federal courts must retain a relationship to executive adjudication that preserves the rule of law.[292] This requirement dominates the doctrines that define judicial review of administrative action and has led to a system in which executive oversight of adjudication is usually shared with the judiciary.[293] Consequently, it is easy to confuse the sufficiency of *governmental* control of adjudication with the sufficiency of *executive* control to meet the distinctive needs of the executive branch.

Where, then, is the boundary between performance or oversight of adjudication that Congress *may* grant the executive and that which it *must* grant the executive? The Supreme Court's definition of "execution" for purposes of forbidding Congress from intruding on executive prerogative is overbroad: "Interpreting a law enacted by Congress to implement the legislative mandate is the very essence of 'execution' of the law."[294] Manifestly, this formulation also encompasses the duties of federal courts. A focus on "policy making" is also oversimplified, because federal courts make policy every day by interpreting statutes—for example, by forming antitrust policy under the vague charter of the Sherman Act.[295]

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[288] *See* Pillsbury Co. v. FTC, 354 F.2d 952, 964 (5th Cir. 1966) (stating that congressional intervention in agency adjudicative functions raises concerns about the constitutional right to due process).

[289] *See* 5 U.S.C. § 557(d) (1982).

[290] *See generally Cost-Benefit Analysis and Agency Decision-Making: An Analysis of Executive Order No. 12,291*, 23 ARIZ. L. REV. 1195, 1195-97 (1981) (discussing presidential requirements that agencies support rules with cost-benefit analyses).

[291] *See, e.g.*, Sierra Club v. Costle, 657 F.2d 298, 409-10 (D.C. Cir. 1981) (upholding the legality of unrecorded contacts with rule makers by both executive and congressional officers); D.C. Fed'n of Civic Ass'ns v. Volpe, 459 F.2d 1231 (D.C. Cir. 1971) (holding congressional influence that produces agency decision based on factors not made relevant by statute is grounds for remand), *cert. denied*, 405 U.S. 1030 (1972).

[292] *See* Fallon, *supra* note 143, at 938-45 (arguing that preservation of judicial review of executive action satisfies article III interests).

[293] *Id.* at 923-26.

[294] Bowsher v. Synar, 478 U.S. 714, 733 (1986).

[295] 15 U.S.C. §§ 1-7 (1982 & Supp. IV 1986); *see, e.g.*, United States v. Wise, 370 U.S. 405, 416 (1962) (holding that despite the vagueness of the Sherman Act, a corporate officer is subject to

Recall the Court's struggle to define adjudicative functions that *may* be placed in the executive branch.[296] The policy component of "public rights" meant that Congress could, but need not, allocate them to the executive.[297] Plainly, within wide limits Congress may decide whether adjudication should be performed in a federal court, an executive agency, or a constitutional hybrid, such as a legislative court or independent agency. Moreover, considering that Congress may require formal adjudicative procedure wherever it places decision-making authority, the "organization chart" aspects of the placement do not necessarily make a sharp difference.

Congress, however, may insulate a function from the oversight of all three constitutional branches in a way that hampers political accountability or allows arbitrariness. Courts frequently approach this question as a due process issue of the permissibility of private delegations.[298] These delegations also raise a distinct question relating to executive supervision. Some functions are neither reviewable in court nor readily amenable to effective congressional oversight. Examples include foreign affairs and monetary policy making. For such functions, the nature and extent of executive supervision determines the sufficiency of governmental control. Therefore, weak ties to the executive are less justifiable if oversight by the other branches is disabled and more justifiable if it survives.

When Congress authorizes or requires a delegation to arbitrators, its allocative decision merits deference, as would the alternatives of delegating to judges or executives. The amenability of arbitration to judicial or executive review of the kinds outlined above[299] provides a legitimating element of governmental control.

5. *Neutral Deciders and Public Policy.*—Arbitration in government programs raises special considerations relating to both executive power and due process. Arbitration promotes due process because it alleviates bias problems that attend administrative adjudication. Yet this gain may be won at the cost of sacrificing executive responsibility for policy. Congress may accommodate these constitutional values by retaining executive control of policy making and allocating some functions of policy

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prosecution regardless of whether he was acting in a representative capacity); *cf.* Winters v. New York, 333 U.S. 507, 537-38 (1948) (noting that the Court has rejected the argument that the Sherman Act is unconstitutionally vague).

[296] *See supra* subpart V(A).

[297] *See supra* subpart V(B).

[298] *See supra* Part VI.

[299] *See supra* sections VII(A)(1)-(3).

application to private neutrals. This principle provides a valuable general guideline but does not create a simple solution, because the line between making and applying policy is indistinct. In addition, it may be desirable for arbitrators to discharge a limited role in generating policy, and certainly some fact-finding should remain in executive hands. These judgments hinge on the particular contexts discussed below.

Government arbitration always affects policy in some way. At a minimum, awards constrain the options subsequently open to administrators. Arbitration of money claims against the government, as in Medicare, implicates budgetary concerns. Arbitration in public employee labor relations determines aspects of personnel policy. Even arbitration between private parties indirectly affects the affiliated federal program. Success or failure of the FIFRA arbitrations in *Thomas*, for example, should eventually impinge on the pace of pesticide registrations.

This Article's analysis of the FAA cases stresses the contract basis of the Court's modern approach to arbitration.[300] Consent is also relevant to the acceptability of arbitration in federal programs.[301] Nevertheless, the impossibility of excluding all policy effects raises special concerns for affected third parties, who have not consented to the use of private deciders. If kept within limits, the presence of third-party effects should not rule out arbitration.

Arbitration reduces executive power, but its effects should be kept in perspective. Comparison of a private delegation with the government function it displaces must include consideration of the legal constraints on that function, to see how much discretion the executive actually loses and to what extent the executive retains control over arbitration.

A brief look at the use of ADR techniques in rulemaking demonstrates these principles. Rulemaking draws the President's supervisory role directly into question, because it concerns generalized policy.[302] Nevertheless, private groups influence rule makers. Although the original purpose of the APA's notice and comment procedures was only to provide affected persons an opportunity to educate the policy makers,[303] administrative law presently pursues a more ambitious goal—to use diverse outside pressures to encourage rule makers to follow the public interest.[304]

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[300] *See supra* subpart II(B).

[301] *See supra* notes 227-29 and accompanying text.

[302] *See* Cutler & Johnson, *supra* note 277, at 1411 (discussing the President's unique situation and capability to act quickly in formulating and articulating national policy goals).

[303] *See* Nathanson, *Probing the Mind of the Administrator: Hearing Variations and Standards of Judicial Review Under the Administrative Procedure Act and Other Federal Statutes*, 75 COLUM. L. REV. 721, 754-55 (1975).

Under the ACUS recommendation on negotiated rulemaking, private groups negotiate a proposed rule, which then undergoes the usual notice and comment process. This process does not differ sharply from the bargaining that occurs informally under notice and comment procedures.[305] Private parties have a substantial influence on the process, but final policy decisions remain with the government.[306] Similarly, delegation to arbitrators need not equal abdication, because constraints on arbitration can satisfy the executive's supervisory needs. As administrative adjudication demonstrates, much depends on the program's structure, which is the topic of the next subpart.

B. The Scope of the Appointments Clause

In *Buckley v. Valeo*,[307] the Supreme Court held that Congress could not appoint members of the Federal Election Commission (FEC). The Court read the appointments clause[308] to govern the selection of anyone "exercising significant authority pursuant to the laws of the United States."[309] In defining that phrase, the Court distinguished informational and investigative functions, which need not be performed by "Officers of the United States," from the FEC's enforcement powers—such as litigating, rulemaking, and adjudicating—which could only be performed by officers or their employees.[310]

Buckley is a formalist opinion with no obvious limits to its logic.[311] A plausible interpretation is that it requires all adjudicative activities to be kept in the hands of federal employees. Nevertheless, the context of the case framed the Court's distinctions. The Court considered whether Congress could assume the President's appointments power, not whether it could authorize or require the delegation to private parties of some functions the executive could perform. The problem of congressional aggrandizement disappears when Congress allocates the appointment power elsewhere.[312] The need to prevent interference with core functions remains and requires an inquiry into whether the President lacks supervisory powers necessary to oversee the execution of the laws.[313]

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[304] *See* Office of the Chairman, Admin. Conference of the U.S., A Guide to Federal Agency Rulemaking 95-99 (1983) (discussing the involvement of outside groups in the rulemaking process).

[305] Moreover, modern agencies often employ private consultants in rulemaking and may rely substantially on them in the deliberative process as long as the agencies do not abdicate the ultimate statutory responsibility for decision. United Steelworkers v. Marshall, 647 F.2d 1189, 1217 (D.C. Cir. 1980).

[306] *See, e.g.*, 1 C.F.R. § 305.82-4 (1988) ("The final responsibility for issuing the rule would remain with the agency."); *see also* Harter, *supra* note 7, at 109 (suggesting that because the agency retains final rulemaking authority, this type of regulatory negotiation does not constitute an "impermissible delegation of governmental authority to a private group").

[307] 424 U.S. 1, 143 (1976) (per curiam).

[308] U.S. Const. art. II, § 2, cl. 2.

[309] *Buckley*, 424 U.S. at 126.

[310] The Court noted that employees are "lesser functionaries subordinate to officers of the United States." *Id.* at 126 n.162.

[311] *See* Bruff, *supra* note 133, at 500 (arguing that *Buckley* was primarily formalist and that the Court did not address Congress's ability to exclude the President from a supervisory role).

The *Buckley* Court adopted a broad definition of the executive activities that are subject to the appointments clause. The Court emphasized that execution of the laws includes diverse functions typical of all three constitutional branches.[314] Granted, but *Buckley* had no occasion to consider less than a complete displacement of power to select deciders.[315] Nor did the Court consider constitutional values other than the separation of powers, such as due process. Thus, *Buckley* does not resolve the question of most interest here: What minimum relationships between an officer and a decider are necessary to satisfy concerns related to the appointments clause?

Two possible approaches may satisfy *Buckley*. First, courts could ask only whether a decider is technically a government employee. Under this approach, arbitrators could be government employees from any agency not involved in a particular dispute. The purpose would be to obtain neutrality while keeping discretion in government hands. Yet if *Buckley* is meant to preserve accountability for and control of execution by executive officers, it is not the formal affiliation of an arbitrator with the government that matters. Instead, the officer having statutory responsibility for administering the program must retain control.

Thus, courts could ask a more focused question: Is the particular activity in question sufficiently controlled by the responsible officer?[316]

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[312] *See* Morrison v. Olson, 108 S. Ct. 2597, 2620-21 (1988); *see also* Melcher v. Federal Open Mkt. Comm., 644 F. Supp. 510, 520 (D.D.C. 1986) (distinguishing both *Buckley* and *Bowsher* as involving "attempts to enlarge the legislative authority at the expense of that of the Executive Branch"), *aff'd*, 836 F.2d 561 (D.C. Cir. 1987), *cert. denied*, 108 S. Ct. 2034 (1988).

[313] *See Morrison*, 108 S. Ct. at 2619.

[314] *Buckley*, 424 U.S. at 140-41.

[315] For example, nothing in *Buckley* forbids exposing an officer to private influence, as long as the officer retains the power to decide. *See* Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381, 388 (1940) (holding that coal producers may propose minimum prices to agency, which can approve, disapprove, or modify them).

[316] This inquiry is illustrated by *Melcher*, 644 F. Supp. at 523, which involved the formation of monetary policy by the FOMC. The district court considered the FOMC's status under *Buckley*. Seven members (the Board of Governors of the Federal Reserve System) are unquestionably "Officers of the United States." The other five are private bankers selected by the boards of directors of the regional Federal Reserve Banks. The court declined to characterize the private members of the FOMC as government officers, *see id.* at 519, although the Board of Governors supervises them in their other capacity as officers of the various Reserve Banks. The court pointed to the absence of any clear authority for the supervision of these individuals in their role as FOMC members. *Id.*

This is the appropriate inquiry, because it isolates the executive's superv sory needs. Recognizing the variety of possible relationships between th executive and its delegates, such as part-time employment and indepenc ent contractor status, this approach would avoid considering only forma appointment or full-time employment. Courts could assess each relation ship to determine the extent to which an officer controls delegate discretion.

Available methods of controlling arbitration can meet the execu tive's constitutional responsibilities.[317] Absent these controls, the consti tutionality of federal arbitration will not be preserved by the forma status of the arbitrator as an officer or employee of the United States because that status will lack a nexus to the performance of delegate governmental powers. On the other hand, the presence of the control prevents interference with core executive functions.

C. *Selecting Arbitration and Arbitrators*

The appropriateness of arbitration for resolving a particular type of dispute depends on a variety of factors, including the identity of the parties, the nature of their interests, the issues raised, and expressed congressional goals. This subpart examines the interrelationships of these factors in various contexts.

Congress frequently authorizes but does not require agencies to resort to arbitration when the government is a party to the controversy.[318] Voluntary arbitration of such disputes allows agencies to satisfy executive interests, whether the choice of procedure occurs before or after a controversy arises. The primary executive interest is efficiency. By referring some claims to a third party for expeditious handling, an officer minimizes process costs and saves time for more important cases. Arbitration also promotes efficiency indirectly by relying on a neutral decider and thereby increasing the acceptability of outcomes and reducing appeals. Referral of claims against the government also addresses a second concern—due process values—by avoiding undue interest, or an appearance of it, in the outcome.

In certain contexts, such as the determination of minor Medicare claims, the nature of the issues and the governmental interest in efficiency are such that arbitration is particularly appropriate. Here, Congress should have the power to make arbitration mandatory. Indeed,

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[317] *See infra* notes 333-38 and accompanying text.

[318] The ACUS recommends mandatory arbitration only for disputes between private parties incident to a federal program, and not for those to which the government is a party. *See* 1 C.F.R. § 305.86-3 (1988).

Congress typically specifies procedures for administrative adjudication. Arbitration, of course, offers the unique consideration of some loss of executive control over policy effects of the process. Nevertheless, the executive does not ordinarily enjoy unrestricted dominion even for policy, and requiring certain methods for selecting and supervising arbitrators should preserve opportunities for the executive to control the formation of policy and to influence its application.[319]

When the government acts only as arbiter of disputes between citizens, as in securities arbitration, the need for executive choice of process declines. Nevertheless, the executive retains responsibilities that arise out of the public purposes underlying the related administrative program. The nature of the obligation can be seen in the FAA cases, in which the Court held that contract values can support the acceptability of arbitration.[320] The basis of these decisions was the freedom of contract notion that parties can negotiate for any dispute resolution procedure they desire. Even in such formally voluntary arbitral programs the executive should monitor the relative bargaining power of the parties to determine the genuineness of consent to arbitration. To the extent doubts arise about consent, the executive should use its supervisory powers to adjust the nature of arbitration in pursuit of fairness—for example, by specifying the qualifications for arbitrators.[321] Mandatory arbitration, as in FIFRA, presents heightened responsibilities of this kind. Executive control of the process can forestall fears that one party will oppress another.[322]

For programs in which the executive has a substantial interest in arbitration, methods of structuring the scheme and selecting arbitrators can reflect that interest in a compromise with strict neutrality. The legality of a private delegation typically depends on whether a court concludes that the composition of the deciding group represents the interests affected.[323] Persons selecting private deciders, however, frequently must weigh the benefits of expertise in the subject matter against the costs to neutrality from the source of the expertise.[324] Hence, balance, rather

[319] *See infra* notes 333-35 and accompanying text.

[320] *See supra* subpart II(B).

[321] *See, e.g.*, J. MURRAY, A. RAU & E. SHERMAN, *supra* note 13, at 523 (noting that the SEC, in response to criticism contained in the dissenting opinion in Shearson/American Express v. McMahon, 107 S. Ct. 2332, 2346-59 (1987) (Blackmun, J., concurring in part, dissenting in part), was considering changes to assure arbitral impartiality in the securities industry).

[322] Such fears appear to be the basis for many of the private delegation decisions, such as Carter v. Carter Coal Co., 298 U.S. 238 (1936). *See supra* subpart III(A).

[323] Note, *Rethinking Regulation: Negotiation as an Alternative to Traditional Rulemaking*, 94 HARV. L. REV. 1871, 1883 & n.66 (1981).

[324] One example is prior service in the agency or industry. The ACUS has recognized the inevitability of these trade-offs in its recommendation on acquiring the services of ADR neutrals.

than unalloyed neutrality, should be the predominant goal of arbitral schemes.

There are several ways to pursue balance in arbitration. First, a mixed public/private body can determine whether to arbitrate. Arbitration of contract impasses with federal workers, for example, occurs on the approval of the Federal Service Impasses Panel, a part-time body composed partly of government employees.[325] This approach reflects the policy orientation of "interest" arbitration, which resolves distributional issues between the parties on a prospective basis.[326] Such prior approval is typically unnecessary when policy concerns are not in issue, as in "grievance" arbitration, which considers rights under preexisting arrangements.

Second, the composition of multimember panels can reflect interests in appropriate proportions.[327] Such a scheme is employed to resolve labor disputes in the United States Postal Service. An arbitral board composed of one member selected by the Service, one by the union, and a third selected by the other two members, adjudicates bargaining impasses between the Service and its employees.[328] The Department of Education also employs mixed panels, formed of a minority of federal employees and a majority of private members, to adjudicate certain disputes with its grant recipients.[329]

Moreover, even single-arbitrator schemes can reflect the preferences of both sides. In commercial arbitration, the AAA sends a list of names to the parties, who strike those to whom they object and number the others in order of preference. The AAA selects the arbitrator according

See 1 C.F.R. § 305.86-8 (1988). *See generally* G. RUTTINGER, ACQUIRING THE SERVICES OF NEUTRALS FOR ALTERNATIVE DISPUTES RESOLUTION AND NEGOTIATED RULEMAKING: REPORT FOR THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES (1986) (suggesting potential criteria for establishing qualifications for ADR neutrals).

[325] *See* 5 U.S.C. § 7119 (1982).

[326] *See generally* Craver, *supra* note 19, at 559-61 (arguing that "interest" arbitration involves issues that can drastically affect the services received by the public and the expenditure of governmental revenues); Kanowitz, *supra* note 25, at 244-50 (arguing that "interest" arbitration reduces the number and scope of socially disruptive economic disturbances); Note, *Binding Interest Arbitration in the Public Sector: Is it Constitutional?*, 18 WM. & MARY L. REV. 787, 819-21 (1977) (asserting that binding interest arbitration statutes should be carefully worded to harmonize the conflicting interests of the general public, public employers, and public employees).

[327] *See* Melcher v. Federal Open Mkt. Comm., 644 F. Supp. 510, 523 (D.D.C. 1986) (stating that *Buckley* concerns are alleviated by the presence of a government majority on the FOMC), *aff'd*, 836 F.2d 561 (D.C. Cir. 1987), *cert. denied*, 108 S. Ct. 2034 (1988).

[328] *See* 39 U.S.C. § 1207 (1982). Failing agreement on selection of a third member, the Director of the Federal Mediation and Conciliation Service chooses one. *Id.* § 1207(c)(1).

[329] *See* 20 U.S.C. § 1234(c) (1982). *See generally* B. MEZINES, J. STEIN & J. GRUFF, ADMINISTRATIVE LAW § 54.05(2)(a) (1987) (discussing the structure and staffing of the Education Appeal Board).

to mutual preference.[330] Federal agencies borrow these practices, sometimes by direct referral to the AAA.[331]

These techniques furnish the executive with sufficient tools to balance supervisory and neutrality concerns that arise in the selection of deciders. Compare these procedures with ordinary administrative adjudication, which administrative law judges usually perform in the first instance. For either adjudication or arbitration, an agency may consider the overall neutrality and competence of the pool of deciders when deciding whether to utilize their services instead of alternative processes. But an agency sometimes has more power to select a private decider than a public one, because in arbitration agencies can influence the choice of a decider for a particular case, whereas ALJs usually rotate in assignments.[332]

D. Supervising Arbitrators

Although presidential authority to supervise independent agencies and adjudicators is limited, the President enjoys the constitutional power to appoint the deciders and retains a general interest in their performance.[333] Accordingly, arbitration in federal programs should be subject to two kinds of executive monitoring. First, the program should contain some overall scrutiny to determine whether the scheme meets expectations. Like any procedure, arbitration is more successful for some disputes than others.[334] In the present era of experimentation with ADR techniques, the executive has a continuing monitoring responsibility. Federal arbitration schemes often concern large stakes, such as millions of dollars of aggregate expenditures of public or private money. For some arbitral programs, then, "wholesale" review is more important to the executive than "retail" review of a particular decision. Of course, oversight does have its perils; when the government is a party to arbitration, monitoring must steer a careful course, assessing the overall accuracy of the process without intervening in particular cases.[335]

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[330] *See* Commercial Arbitration Rules, *supra* note 15, at 34. The person selected must disclose "any circumstances likely to affect impartiality" and is subject to disqualification by the AAA. *Id.* at 35. Similarly, the Court has read the FAA to require disclosure of possible bias. *See, e.g.*, Commonwealth Coatings Corp. v. Continental Casualty Co., 393 U.S. 145, 147 (1968) (stating that provisions authorizing courts to vacate fraudulent awards "show a desire of Congress to provide not merely for *any* arbitration but for an impartial one").

[331] *See, e.g.*, 29 C.F.R. § 1440 app. (1988) (pesticide registrations); 40 C.F.R. § 305.31 (1987) (Superfund), *revoked*, 52 Fed. Reg. 33812 (1987).

[332] *See* 5 C.F.R. § 930.212 (1988). The Supreme Court, however, has approved some agency discretion to match an ALJ's background to the subject matter. *See* Ramspeck v. Federal Trial Examiners Conference, 345 U.S. 128, 139-40 (1953) (approving a rotation scheme of ALJs on the basis of their ability to handle complex and difficult cases).

[333] *See* Subcomm. on Administrative Practice and Procedure, 86th Cong., 2d Sess., Report on Regulatory Agencies to the President-Elect 33 (Comm. Print 1960): "The congestion of the dockets of the agencies, the delays incident to the disposition of cases, the failure to evolve policies pursuant to basic statutory requirements are all a part of the President's constitutional concern to see that the laws are faithfully executed."

[334] *See* Getman, *Labor Arbitration and Dispute Resolution*, 88 Yale L.J. 916, 918-34 (1979) (emphasizing the connection between the collective bargaining relationship and the success of labor arbitration).

Second, agencies must exercise some control over the conduct of particular arbitrations by providing a standard for decision and by reviewing awards to ensure fidelity to it.[336] Ordinarily, an agency elaborates its statutory standards through rulemaking. The executive thus controls arbitration even when statutes mandate it.[337] Of course, the specificity of standards should vary with the subject matter. Instructions should be more detailed for relatively policy-laden subjects (such as interest arbitration in labor relations) than for more fact-intensive ones.[338]

In general, the FAA criteria are suited to review of arbitration either in the agency or in district court.[339] Agency review under FAA standards would not be as stringent as review of much administrative adjudication, because of the latter's structure to reflect a greater policy content.[340] When arbitral schemes have relatively large effects on agency policy—for example, in interest arbitration with federal employees—agency review for facial legality of the award must encompass a judgment that the policy effects are acceptable.[341] In this way, agencies can accommodate *Buckley*'s implication that executive officers must always be accountable for public policy. Even in non-"policy" contexts, examination of particular awards should aid the search for recurring problems.

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[335] Several commentators have suggested a similar type of limited review of ALJ performance. *See* Lubbers, *supra* note 163, at 125-26 (acknowledging the necessity of an independent corps of ALJs, but calling for objective performance evaluations based on statistical data drawn from cases decided over a significant time period); Note, *Administrative Law Judges, Performance Evaluation, and Production Standards: Judicial Independence Versus Employee Accountability*, 54 GEO. WASH. L. REV. 591, 594 (1986) (noting the delicate balance that ALJs must tread in adjudicating agency policies and in remaining independent of agencies); *cf.* Association of Admin. Law Judges v. Heckler, 594 F. Supp. 1132, 1140-41 (D.D.C. 1984) (stating that generalized executive review of ALJ performance is legitimate as long as it does not skew the outcome of particular adjudications).

[336] Additionally, if an arbitrator exceeds delegated authority in a pending case, an agency may seek redress by invoking the familiar jurisdiction of the courts to determine an arbitrator's jurisdiction. *See supra* notes 44-47 and accompanying text.

[337] Professor Fallon has argued that *Thomas* was wrongly decided, because it delegated authority to arbitrators to decide issues of "law." *See* Fallon, *supra* note 143, at 991. The vague standard at issue in *Thomas* certainly needed elaboration. *See supra* notes 268-70 and accompanying text. If an agency appropriately confines arbitral discretion by specifying the content of the governing norm, there should be no need to invalidate the entire scheme.

[338] See Craver, *supra* note 19, at 566-67, for examples of varying criteria used for interest arbitration. Recent state cases considering the validity of private delegations have often concerned public employee interest arbitration. Most courts have upheld these schemes against delegation attacks. *See, e.g.*, City of Richfield v. International Firefighters Ass'n, 276 N.W.2d 42, 45-46 (Minn. 1979) (holding that delegation to arbitrators is constitutional if founded on a definite policy); State v. City of Laramie, 437 P.2d 295, 300-01 (Wyo. 1968) (stating that functions are delegable if the delegate executes previously determined law). Other cases have invalidated such schemes. *See, e.g.*, Greeley Police Union v. Greeley City Council, 191 Colo. 419, 422, 553 P.2d 790, 792 (1976) (holding delegation unconstitutional in the absence of public accountability); Salt Lake City v. International Ass'n of Firefighters, 563 P.2d 786, 789-90 (Utah 1977) (same).

[339] *See* 9 U.S.C. § 10 (1982). The ACUS recommendation facilitates this limited review by calling for a brief, informal discussion of the factual and legal basis for an award. *See* 1 C.F.R. § 305.86-3 (1988).

[340] Agencies may overturn ALJ decisions readily, as long as substantial evidence supports the final decision. *E.g.*, FCC v. Allentown Broadcasting Co., 349 U.S. 358, 364 (1955) (clarifying that

In arbitration, the executive loses ordinary fact review but gains the speedier resolution of disputes. More intensive fact review would vitiate the distinctive advantages of arbitration by forcing arbitrators to provide the procedural formalities necessary to build a suitable record. Nevertheless, a limited review under FAA criteria should help agencies to discharge their responsibilities to supervise arbitration.[342] An agency can perceive problems far more easily than district judges scattered around the country, each of whom sees an occasional case presenting part of the spectrum. Moreover, an agency's ordinary rulemaking powers offer much more flexibility than federal courts possess to shape an arbitral program in response to developments. If agencies perform this "retail" review, there would be no need for judicial duplication, although courts could still examine issues concerning the "wholesale" validity of the scheme.

E. Arbitration and Enforcement Functions

The functions that *Buckley* denied to congressional appointees all involved the governmental coercion of primary conduct. Perhaps that role involves responsibilities that the executive may never delegate. The differences between coercive and noncoercive governmental action, however, are easy to exaggerate. As economists are quick to note, both the carrot and the stick influence behavior. Nevertheless, legal controls on government monitor coercive activities most closely.[343] Functional analysis gives some weight to the degree of coercion present in an activity, without resting exclusively on that factor. The diverse subject matter of

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the strict "clearly erroneous" rule does not apply to an examiner's findings and that an agency may overrule an examiner so long as it does so based on substantial evidence). Indeed, final adjudicative authority frequently vests in the political executives at the head of the agency. *See, e.g.*, NLRB v. Bell Aerospace Co., 416 U.S. 267, 295 (1974) (holding that the choice to adjudicate lies in the first instance within the NLRB's discretion).

[341] This kind of review would accord with statutory or administrative criteria such as those empowering the Federal Labor Relations Authority to invalidate civil service awards that are "contrary to any law, rule, or regulation." 5 U.S.C. § 7122(a)(1) (1982).

[342] Restricted by FAA standards, this function would not introduce impermissible levels of bias.

[343] *See* Heckler v. Chaney, 470 U.S. 821, 832 (1985) (noting that coercive applications of government power are more amenable to judicial review).

federal programs suggests that a single characteristic should not predominate.

Proposals are circulating that suggest employing arbitration in some enforcement contexts, such as the revocation of permits for hazardous waste facilities.[344] Such a scheme must contain certain limits. The executive traditionally enjoys wide prosecutorial discretion, because the component activities of gathering information, setting priorities, and allocating resources affect many of an agency's responsibilities and are difficult to monitor effectively from the outside.[345] Hence, permitting an arbitrator to choose whom to prosecute or to decide other issues that implicate general enforcement policy would divest the executive of core functions.

Private neutrals could, however, play a number of other roles. First, they could influence enforcement in ways that do not formally displace executive discretion. A portion of the ACUS recommendation, for example, suggests employing various ADR techniques, including negotiation, mediation, and "minitrials," in the settlement of litigation.[346] These techniques vest actual settlement authority in the hands of government officers. The recommendation, however, would expose settlements raising major public policy issues or third-party effects to notice and comment, thereby reaping the benefits of exposing deciders to outside influences.[347] Thus, the process would not rely solely on interested parties and the ADR neutral, whose perspective may be limited, in settling cases having implications beyond their facts.

Second, private neutrals could arbitrate fact questions underlying an enforcement dispute. Efficiency gains from informal process would accrue without sacrificing the executive's needs to set overall enforcement priorities and policy. This kind of arbitration should be voluntary, to alleviate concerns for both executive prerogative and fairness to affected parties.

Finally, though the issue is more difficult, agencies could employ private neutrals to arbitrate the application of settled criteria for sanctions such as permit revocation to a particular respondent. The executive thereby retains control of overall policy by formulating the standards for sanctions. But an important aspect of prosecutorial discretion concerns law-applying—the decision whether to compromise a charge or to take it to trial. Administrative law accommodates the combination of prosecutorial and adjudicative functions in a single agency, with appropriate safeguards.[348] Nevertheless, reducing the potential for bias that attends the selection of sanctions by the investigating office promotes due process.[349] Voluntary arbitration thus alleviates concerns for both executive and individual interests. As in other federal arbitration schemes, the use of private deciders can promote public values.

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[344] *See generally* Holznagel, *Negotiation and Mediation: The Newest Approach to Hazardous Waste Facility Siting*, 24 B.C. ENVTL. AFF. L. REV. 329 (1986) (discussing the success of various state-law arbitration approaches in resolving waste facility disputes).

[345] *See Heckler*, 470 U.S. at 831 (discussing wide-ranging agency prosecutorial discretion); FTC v. Universal-Rundle Corp., 387 U.S. 244, 249-50 (1967) (upholding FTC's discretion to determine whether to prosecute).

[346] *See* 1 C.F.R. § 305.86-3 (1988). Minitrials are abbreviated summaries of trial evidence, presented before principal officers of the litigants who are authorized to settle the case.

[347] At present, consent agreements are sometimes subjected to notice and comment procedures. *See* G. ROBINSON, E. GELLHORN & H. BRUFF, *supra* note 283, at 549.

VIII. Conclusion

To satisfy the due process and separation of powers concerns emanating from articles II and III of the Constitution, arbitral schemes must have certain relationships with federal courts and agencies. Agencies are responsible for the composition of the arbitral pool, the method of selecting arbitrators in particular cases, and the articulation of the governing norm. When arbitration does not have the full consent of private parties, agencies have a special responsibility to assure its fairness by supervising the conduct of arbitration in ways consistent with its neutrality. Agencies must review awards in the limited ways that are familiar in private arbitration, and also for their consistency with the agency's law and policies. Federal courts can then defer to agencies for review of individual awards, while retaining their traditional function of deciding statutory and constitutional challenges to the scheme as a whole.

Thus, the basic role of arbitration in federal programs is to apply relatively well-defined public-law norms to factual disputes. Arbitration can thereby promote goals of neutrality, expertise, informality, and expedition in resolving these disputes. The policy effects of arbitration, although inescapable, must be minimized through articulation of the governing standard and review for the consistency of awards with the agency's law and policy. Under appropriate constraints, private deciders can play a role in the administration of public programs.

[348] *See* Marshall v. Jerrico, Inc., 446 U.S. 238, 252 (1980) (holding that administrator acting as prosecutor could make preliminary assessment of civil penalties that could become available to the agency, with ALJ adjudicating the penalties).

[349] *See* Hortonville Joint School Dist. No. 1 v. Hortonville Educ. Ass'n, 426 U.S. 482, 492-93 (1976) (holding that school board could both negotiate with teachers and discharge them for illegally striking after negotiations failed). In *Hortonville*, provision of a neutral decider would have eliminated the need for the Court to inquire whether the facts raised a sufficient danger of bias to deny due process.